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Title: National Labor Relations Board, Petitioner
v.
International Brotherhood of Electrical Workers, Local 340

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Gold/Laurence

try	Date	Note	Proceedings and Orders
1	Apr 11 1986		Application for extension of time to file petition and order granting same until May 22, 1986 (Rehnquist, April 16, 1986).
2	May 22 1986	G	Petition for writ of certiorari filed.
4	Jun 16 1986		Order extending time to file response to petition until July 15, 1986.
5	Jul 16 1986		DISTRIBUTED. September 29, 1986
6	Jul 15 1986		Brief of respondent Internatl. Brotherhood of Electrical Workers, #340 in opposition filed.
7	Aug 4 1986	X	Reply brief of petitioner NLRB filed.
8	Oct 6 1986		Petition GRANTED. Justice Scalia CUT.
			**********
9	Nov 20 1986		Record filed.
10	Nov 20 1986		Certified copy of original record and proceedings received. (3 volumes).
11	Nov 20 1986		Joint appendix filed.
12	Nov 20 1986		Brief of petitioner NLRB filed.
13	Nov 20 1986		Brief amicus curiae of Sacramento Valley Chapt. of Natl. Electr. Contractors filed.
14	Dec 22 1986		Brief amicus curiae of AFL/CIO filed.
15	Dec 22 1986		Brief of respondent Internatl. Brotherhood of Electrical Workers, Local 340 filed.
16	Dec 23 1986		CIRCULATED.
17	Dec 19 1986		SET FOR ARGUMENT. Wednesday, February 25, 1987. (3rd case).
18	Feb 18 1987	X	Reply brief of petitioner NLRB filed.
19	Feb 25 1987		ARGUED.

No. 85-1924

Supreme Court, U.S.
FILED
MAY 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that a union violated Section 8(b)(1)(B) of the National Labor Relations Act by disciplining supervisor-members (who represent management in grievance adjustment or collective bargaining) for working for an employer that does not have a collective bargaining agreement with that union.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-8a) is reported at 780 F.2d 1489. The decision and order of the National Labor Relations Board (App., *infra,* 9a-37a) are reported at 271 N.L.R.B. 995.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 38a) was entered on January 22, 1986. On April 16, 1986, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including May 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 8(b) of the National Labor Relations Act, 29 U.S.C. 158(b), provides:

> It shall be an unfair labor practice for a labor organization or its agents –
>
> (1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances[.]

STATEMENT

1. Harold E. Nutter Inc. (Nutter) and Royal Electric Company (Royal) are electrical contractors in Sacramento, California. At all relevant times Nutter and Royal were members of the Sacramento Valley Chapter of the National Electrical Contractors Association, Inc. (NECA), a multiemployer bargaining group. Prior to 1981, NECA negotiated a series of collective agreements covering the multiemployer bargaining unit with respondent International Brotherhood of Electrical Workers, Local 340 (Local 340 or the Union). The last of those agreements expired on May 31, 1981, and, when negotiations for a new contract were unsuccessful, the Union struck all NECA members, including Nutter and Royal. App., *infra,* 2a, 11a, 12a.

The strike lasted for several months. On September 15, 1981, the Union sent NECA a disclaimer of interest in representing the employees of NECA members in "the multi-[employer] bargaining unit previously established" (App., *infra,* 2a, 12a). Instead, the Union filed 17 separate representation petitions seeking to represent (in single-employer units) persons employed by 17 NECA members. The Union did not file petitions for representation of the employees of either Nutter or Royal. On October 1, 1981,

NECA signed a bargaining agreement with a different union, the National Association of Independent Unions. Both Nutter and Royal adopted that new agreement. *Id.* at 2a, 13a.

Ted Choate, a Local 340 member, was a vice-president and estimator for Nutter. Choate's duties included hiring employees from the Union's hiring hall, transferring employees from jobsite to jobsite, visiting jobsites, and supervising foremen. One supervisor with specific responsibility to adjust employee grievances reported directly to Choate in the company's management hierarchy. App., *infra,* 21a. Albert Schoux, another Local 340 member, was Royal's superintendent at one of its jobsites. His duties included planning and ordering materials for the job, and hiring, assigning, transferring and firing employees. Schoux handled and resolved employees' job-related requests and personal problems, such as requests for time off and complaints about particular work assignments. *Id.* at 14a-16a.

In the late fall of 1982, internal union charges were filed against both Choate and Schoux by Local 340, alleging that they had violated the Union's constitution by working for employers who did not have a collective bargaining agreement with the Union. Each was found guilty by a separate Union trial board. Choate was fined $6,000 and Schoux $8,200. App., *infra,* 3a.

2. The Board, adopting the findings and conclusions of the administrative law judge, concluded that the Union violated Section 8(b)(1)(B) of the Act, 29 U.S.C. 158(b)(1)(B), by fining Choate and Schoux. The Board found that both men were supervisors who acted as grievance adjustment or collective bargaining representatives for their employers and that, by fining them because they worked for non-signatory employers, the Union had restrained and coerced Nutter and Royal in the selection and retention of their representatives for those purposes. App., *infra,* 28a, 34a.

The Board rejected the Union's contention, based on the Ninth Circuit's decision in *NLRB* v. *IBEW, Local Union No. 73 (Chewelah)*, 714 F.2d 870 (9th Cir. 1980), that the Union could not have violated Section 8(b)(1)(B) because it did not have or intend to establish a collective bargaining relationship with Nutter or Royal at the time it fined Choate and Schoux. The Board held that *Chewelah* was inconsistent with this Court's decision in *American Broadcasting Cos.* v. *Writers Guild (ABC)*, 437 U.S. 411 (1978). The Board explained that in *ABC* this Court found that discipline imposed on grievance-handling supervisors who crossed union picket lines violated Section 8(b)(1)(B) even though the supervisors did not supervise or adjust grievances of the striking employees, but only employees the striking union did not represent or desire to represent. The Board noted further that, although the union in *ABC* represented certain of the complaining employer's employees, the Court made clear that its rationale applied equally to situations in which the union did not represent any employees of the complaining employer. App., *infra*, 30a-31a (citing *Plumbers Local 364*, 254 N.L.R.B. 1123, 1126-1127 (1981)).[1]

3. The Ninth Circuit denied enforcement of the Board's order. At the outset, the court upheld the Board's findings that Choate and Schoux were supervisors and representatives of their employers for the purpose of

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[1] In addition, the Board concluded that, even under the Ninth Circuit's *Chewelah* decision, the Union violated Section 8(b)(1)(B) because one of the purposes of the fines was to pressure Nutter and Royal ultimately to sign a collective agreement with the Union. Thus, the Board found that the fines were intended to "force the employers out of the NECA multiemployer bargaining and into bargaining on a single employer * * * or new association basis" (App., *infra*, 33a).

grievance adjustment or collective bargaining,[2] and the court recognized that "[f]ines imposed on representatives may constitute prohibited coercion because the effect of the discipline may be to deprive an employer of the services of his representative" (App., *infra,* 4a, 5a). The court, however, found that its prior decision in "*Chewelah* controls and is dispositive of the issue in this case" (App., *infra,* 6a).

In *Chewelah,* the court ruled that a union had not violated Section 8(b)(1)(B) of the Act by fining a member-supervisor with grievance-handling responsibility for working for a nonunion employer (Chewelah) because the union neither represented nor sought to represent Chewelah's employees and therefore "had no incentive to either influence Chewelah's choice of bargaining representative or affect [the disciplined supervisor's] loyalty to Chewelah." 714 F.2d at 871. Applying these principles to this case, the court held that "when a union does not represent or intend to represent the complaining company's employees there can be no Section 8(b)(1)(B) violation when a union disciplines members even if they are designated bargaining representatives" (App., *infra,* 5a).[3]

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[2] In upholding the Board's findings as to the representative status of the two supervisors, the court did not rely on the Board's so-called "reservoir doctrine." Under that doctrine, all statutory supervisors are considered collective bargaining or grievance handling representatives for the purposes of Section 8(b)(1)(B) because they are part of the "logical reservoir" from which an employer is likely to select representatives to perform such responsibilities (App., *infra,* 4a-5a). The court agreed with the Board that the record established that the two supervisors here in fact performed grievance adjustment tasks (*id.* at 5a).

[3] The Board contended that *Chewelah* was distinguishable because the Union in this case had in fact demonstrated an interest in representing Nutter's and Royal's employees. The court rejected that contention, holding instead that "where a Union has filed a disclaimer of interest, and has made no subsequent organizing efforts, its discipline of members fully a year after the termination of the bargaining

REASONS FOR GRANTING THE PETITION

The court of appeals' ruling that a union may not be found to violate Section 8(b)(1)(B) by fining supervisor-members if the union does not represent or have an intent to represent the employees of the complaining employer is inconsistent with the statutory language and with this Court's decision in *ABC*. In addition, the decision below is in direct conflict with the decision of the Eleventh Circuit in *NLRB* v. *IBEW, Local Union No. 323,* 703 F.2d 501, cert. denied, 464 U.S. 950 (1983), and conflicts in principle with decisions of the Fifth, Tenth and District of Columbia Circuits.[4] Union discipline of supervisor-members is a substantial and recurring issue in the administration of the National Labor Relations Act, particularly among craft unions whose members may serve as supervisor on one jobsite and journeyman on another. It is therefore important that the proper limits of such discipline be defined. Accordingly, review by this Court is warranted.

1. By its terms Section 8(b)(1)(B) was designed to prevent "restrain[t] or coerc[ion]" of employers in selecting collective bargaining or grievance adjustment represen-

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relationship between the Union and the employers cannot reasonably be construed as an effort to restrain or coerce the employer" (App., *infra,* 7a). The court added that in order to establish a violation of Section 8(b)(1)(B), it would "require some evidence of specific overt acts such as picketing, handbilling, making statements of interest to the employers, or passing out * * * cards to find a desire to represent * * * particular employees" (App., *infra,* 7a).

[4] See *International Organization of Masters* v. *NLRB,* 539 F.2d 554 (5th Cir. 1976), cert. denied, 434 U.S. 828 (1977); *New Mexico District Council of Carpenters (A.S. Horner, Inc.),* 177 N.L.R.B. 500 (1969), enforced, 454 F.2d 1116 (10th Cir. 1972); *International Organization of Masters,* 197 N.L.R.B. 400 (1972), enforced, 486 F.2d 1271 (D.C. Cir. 1973), cert. denied, 416 U.S. 956 (1974).

tatives.[5] Consistent with that purpose, this Court in applying the statute has focused on the potential impact of union conduct on employers (*ABC,* 437 U.S. at 424, quoting *Florida Power & Light Co.* v. *IBEW Local 641,* 417 U.S. 790, 804-805 (1974)):

> "a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline can adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer."

As the Court made clear in *ABC,* Section 8(b)(1)(B) prohibits union discipline of supervisor-members that "may adversely affect" a supervisor's willingness or ability to perform collective-bargaining or grievance-adjustment tasks (437 U.S. at 430), for such discipline coerces an employer in the exercise of his right to choose that supervisor as his collective-bargaining or grievance-handling representative (*id.* at 432, 436). To illustrate the unlawful effect, the Court cited with approval (*id.* at 436 n.36) *New Mexico District Council of Carpenters (A.S. Horner, Inc.,* 177 N.L.R.B. 500 (1969), enforced, 454 F.2d 1116 (10th Cir. 1972), in which the union fined a supervisor-member because he worked for a nonunion employer. The Court stated that "[a] fine imposed in these circumstances violated the section because compliance by the supervisor

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[5] Section 8(b)(1)(B), enacted in 1947, was intended to prohibit unions from dictating " 'who shall represent an employer in the settlement of employee grievances' " or compelling " 'the removal of a . . . supervisor who has been delegated the function of settling grievances.' " *Florida Power & Light Co.* v. *IBEW Local 641,* 417 U.S. 790, 798 (1974) (quoting S. Rep. 105, 80th Cong., 1st Sess. Pt. 1, at 21 (1947)). See *ABC,* 437 U.S. at 436 n.36 (" 'the original rationale of § 8(b)(1)(B) * * * was to permit the employer to keep the bargaining representative of his own choosing' ") (quoting *IBEW Local 134* v. *NLRB,* 487 F.2d 1143, 1155 n.19 (1973)).

with the union's demands would have required his leaving his job and thus have 'the effect of depriving the Company of the services of its selected representative for the purposes of collective-bargaining or the adjustment of grievances.' " 437 U.S. at 436 n.36 (quoting *A.S. Horner,* 177 N.L.R.B. at 502). The situation here is virtually identical to that in *A.S. Horner,* and it " 'thus falls close to the original rationale of § 8(b)(1)(B) which was to permit the employer to keep the bargaining representative of his own choosing.' " *ABC,* 437 U.S. at 436 n.36 (quoting *IBEW Local 134* v. *NLRB,* 487 F.2d 1143, 1155 n.19 (D.C. Cir. 1973)).

In the present case, the court of appeals stated (App., *infra,* 5a) that the effect of the Union's discipline "may be to deprive an employer of the services of his representative." Under this Court's decisions that conclusion should have ended the case. Instead, as it had in *Chewelah,* the Ninth Circuit focused on the union's asserted motive for disciplining the union member, rather than on the effect of the discipline on the union member's employer, and deemed the union's motivation to be dispositive. Thus, in *Chewelah,* the court held that the union's discipline of a member-supervisor who worked for a nonunion employer did not violate Section 8(b)(1)(B) because the union had "no incentive to either influence [the employer's] choice of bargaining representatives or affect [the employee's] loyalty to his employer." 714 F.2d at 871. The emphasis on the union's intent was underscored when, on the Board's petition for rehearing, the court in *Chewelah* amended its opinion to add that "[t]he case may be different if there is evidence that the union's actual purpose in enforcing its bylaw was to interfere with the employer's selection." *Id.* at 871-872.[6]

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[6] The court's initial opinion in *Chewelah* is reported at 621 F.2d 1035 (1980); its amended opinion is at 714 F.2d 870 (1980).

In the present case, the court continued further along the same path (App., *infra,* 7a), stating that before a violation may be found the union must be shown to have "a desire to represent * * * particular employees." *ABC,* however, rejected such a requirement. There, the union (which represented writers in the film industry) disciplined directors, as well as other supervisor-members, for working during a writers' strike. The directors neither supervised writers nor adjusted their grievances, and the union argued that the absence of such a nexus exempted its disciplinary action from Section 8(b)(1)(B). This Court, noting that the directors adjusted *other employees' grievances,* held that a "union may no more interfere with the employer's choice of grievance representative with respect to employees represented by other unions than with respect to those employees whom it itself represents." *ABC,* 437 U.S. at 437-438 n.37. In sum, *ABC* makes plain that the scope of Section 8(b)(1)(B) does not hinge on the union's representational interest or its motivation, but rather on whether union pressure "may adversely affect" the supervisor's performance of protected duties. 437 U.S. at 429.[7]

2. The Ninth Circuit's "union motivation" standard also has been expressly rejected by the Eleventh Circuit. In *Local 323,* the Eleventh Circuit found a violation of Section 8(b)(1)(B) where the union disciplined a supervisor-

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[7] This Court's opinion in *ABC* also effectively disposed of the Ninth Circuit's comment in *Chewelah,* 714 F.2d at 871, that, because a supervisor-member may avoid discipline by resigning from the union, such discipline does not constitute restraint or coercion under Section 8(b)(1)(B). As this Court explained (*ABC,* 437 U.S. at 437), "this submission is simply another argument that union sanctions applied to supervisor-members * * * can never violate § 8(b)(1)(B)," a position the Court rejected, holding that the statute bars discipline that would "adversely affect the supervisor's performance of his collective-bargaining or grievance-adjustment tasks" (437 U.S. at 430).

member with grievance-handling responsibilities because he worked for a nonunion employer, even though the union did not represent or demonstrate an intent to represent the employer's employees. The court, quoting from this Court's decision in *ABC,* stated that "[u]nion discipline of a supervisor contravenes § 8(b)(1)(B) if that coercion 'may adversely affect' his performance of grievance adjustment or collective bargaining responsibilities," and that " '[u]nion pressure on supervisors can affect either their willingness to serve as grievance adjusters or collective bargainers, or the manner in which they fulfill these functions.' " 703 F.2d at 504 (quoting *ABC,* 437 U.S. at 429, 436). The court concluded that, because the supervisor "was fined for his affiliation with a nonunion company, 'compliance . . . with the union's demands would have the effect of depriving the Company of the services of its selected representative' " in violation of the Act. *Id.* at 505 (quoting *ABC,* 437 U.S. at 437 n.36).

The Eleventh Circuit also rejected the contention, based on *Chewelah,* that the discipline was lawful because the union neither represented the employer's employees nor showed any intent to do so. It held that such a restrictive interpretation of the statute is unwarranted and "inconsistent with the central aim of § 8(b)(1)(B)." 703 F.2d at 507. The court explained that (*id.* at 507 (citation omitted)):

> An attempt to force a member-supervisor to cease working for a nonunion company demonstrably infringes on the employer's right to choose that person as its representative. In view of that inevitable result, even a union endeavoring only to enforce an internal regulation, and not primarily motivated to influence an employer's selection, can deprive the employer of the protection afforded by the statute.[8]

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[8] As we have shown, in addition to conflicting directly with the Eleventh Circuit, the decision below conflicts in principle with the Tenth Circuit's decision in *A.S. Horner.* Although in

This clear conflict between the Circuits, which continues to persist and is broadened by the decision below, warrants resolution by this Court.[9]

3. Interpretation of Section 8(b)(1)(B) implicates the " 'difficult and delicate responsibility' " " 'of striking [the] balance to effectuate national labor policy * * * which the

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Horner the union had lost a Board-conducted election several months earlier, the court's rationale makes clear that a union violates Section 8(b)(1)(B) by conduct that has the effect of depriving an employer of the services of its chosen representative, without regard to the reasons or motives for the union's conduct. *A.S. Horner,* 454 F.2d at 1118; see *ABC,* 437 U.S. at 436 n.36. Similarly, decisions of the Fifth and District of Columbia Circuits demonstrate that the gravamen of a Section 8(b)(1)(B) violation is the deprivation of an employer's representative, whether or not the union has a specific representational interest. See *International Organization of Masters* v. *NLRB,* 539 F.2d at 559-560; *International Organization of Masters* v. *NLRB,* 486 F.2d at 1274.

[9] In opposing the union's petition for a writ of certiorari in *Local 323,* we stated that the conflict with *Chewelah* was not clear because the Ninth Circuit in *Chewelah* had not precisely delineated its requirement of a representational interest, and because the record in *Local 323* suggested that the union had demonstrated an interest in representing the affected employer's employees that arguably was sufficient to satisfy the *Chewelah* standard (83-63 Gov't Br. in Opp. at 6-7 n.4). In dissenting from the denial of certiorari in *Local 323,* however, Justice White, joined by Justices Brennan and Blackmun, stated (464 U.S. at 951):

> The conflict between the Ninth Circuit and the Eleventh Circuit is clear. Identical action by a union will constitute an unfair labor practice in the Eleventh Circuit but not in the Ninth. Implementation of the national labor policy is hampered by such conflicting rules.

Any uncertainty about the Ninth Circuit's standard has been dispelled by its opinion in this case and thus it is now clear that the Ninth and Eleventh Circuits have adopted irreconcilable standards for applying Section 8(b)(1)(B). The decision below shows that the Ninth Circuit will stringently apply its requirement of a representational interest and that it would not find a violation in circumstances where the Eleventh Circuit would.

Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.' " *ABC*, 437 U.S. at 431 (quoting *NLRB* v. *Iron Workers*, 434 U.S. 335, 350 (1978)). The Board reasonably concluded that union discipline of supervisor-members with grievance adjustment or collective bargaining responsibilities because they work for a nonunion employer restrains that employer in its choice of representatives for those purposes, and thus violates Section 8(b)(1)(B) of the Act, regardless of the union's motive. By substituting its judgment for that of the Board, the court of appeals impermissibly intruded on the Board's primary responsibility and exceeded the scope of its reviewing authority. In view of the conflict of decisions on this recurring issue,[10] it is important to the administration of the Act that the matter be resolved by this Court.

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[10] In another case arising out of this labor dispute—*IBEW Local 340 (Hulse Electric)*, 273 N.L.R.B. No. 67 (Dec. 14, 1984)—the Board found that the Union had violated Section 8(b)(1)(B) by fining ten supervisors because they worked for non-signatory employers under circumstances identical to those presented here. The Board has not yet sought enforcement in *Hulse Electric*, pending final resolution of this case. In addition, there is one other decided Board case, and at least three cases in which the General Counsel has issued a complaint, that arose in the Ninth Circuit and that would be controlled by the rule applied by the court in this case. *IBEW Local 46 (PAC, Inc.)*, 273 N.L.R.B. No. 167 (Jan. 10, 1985), application for enforcement pending, No. 85-7146 (9th Cir.); *IBEW Local 497*, No. 19-CB-5348 (NLRB) (pending before the Board on a stipulated record); *Plumbers Local 597*, No. 19-CB-5696 (NLRB) (complaint issued Dec. 20, 1985); *Plumbers Local 32*, No. 19-CB-5728 (NLRB) (complaint issued Feb. 28, 1986).

The Board has also rejected the *Chewelah* standard in the following cases: *Plumbers Local No. 364 (West Coast Contractors)*, 254 N.L.R.B. 1123, 1126-1127 (1981); *Painters District Council No. 36 (Brown & Co. Painting Contractor)*, 259 N.L.R.B. 808, 810-811 (1981); *American Federation of Musicians*, 275 N.L.R.B. No. 97

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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MAY 1986

June 13, 1985), slip op. 12. See also *Orange Belt District Council of Painters No. 48 (Ghianni Drywall Construction, Inc.)*, 275 N.L.R.B. No. 164 (July 25, 1985), slip op. 11, 21-25.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-7769
NLRB Nos. 20-CB-5717, 5825, 5781

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340, RESPONDENT.

Application for Enforcement of an
Order of the National Labor Relations Board
Argued and submitted October 7, 1985
San Francisco, California

OPINION

Before: CHAMBERS, TANG, and BOOCHEVER, Circuit Judges.

TANG, Circuit Judge:

The NLRB has petitioned for enforcement of its order holding the International Brotherhood of Electrical Workers, Local 340 ("the Union") in violation of Section 8(b)(1)(B) of the National Labor Relations Act ("the Act") 29 U.S.C. § 158(b)(1)(B)(1982). The Union has fined three of its members for violating a union bylaw prohibiting union members from working for nonunion employers. The Board held that two of the members were supervisors under Section 2(11) of the Act, 29 U.S.C. § 152(11)(1982)

and/or representatives of their employers for collective bargaining and grievance adjustment purposes within the meaning of Section 8(b)(1)(B) and that the Union discipline was thus an unfair labor practice ("ULP"). Although the Union had disclaimed interest in representing the employees of these employers, the Board held that it still had an intent to represent the employees, thus distinguishing the present case from *NLRB v. International Brotherhood of Electrical Workers, Local 73*, 714 F.2d 870 (9th Cir. 1980) (*Chewelah*). We refuse to enforce the order.

BACKGROUND

Royal Electric ("Royal") and Nutter Electric ("Nutter") are electrical contractors who belong to National Electrical Contractors Association, Inc. ("NECA"), an employer association authorized to bargain with the International Brotherhood of Electrical Workers, Local 340, the union of which the employees involved in this case are members. The collective bargaining agreement betweeen NECA and the Union expired on May 31, 1981 and the Union struck on June 11, 1981. The Union disclaimed interest in representing NECA member employees on September 15, 1981 and NECA adopted the disclaimer the next day. The Union filed 17 representation petitions seeking to represent the employees of 17 NECA members in single employer units on September 25, 1981 but it did not then or subsequently file a petition with either Royal or Nutter. NECA signed a collective bargaining agreement with the National Association of Independent Unions ("NAIU") on October 1, 1981 and Nutter and Royal adopted the contract that same day.

The unfair labor practice charges in these cases arise from the Union's imposition of fines on three members who worked for Royal and Nutter. In one case the Administrative Law Judge ("ALJ") ruled that the employee

was not a supervisor within the meaning of the Act and thus the Union fine was not an ULP. The other two disciplinary fines are the subject of this petition for enforcement. The Union fined Albert Shoux a total of $8,200 based on a charge made December 20, 1982 that he was working for Royal, a nonsignatory employer. Shoux worked as a superintendent and had some supervisory or foreman responsibilities. The Union fined Ted Choate a total of $6,000 based on a charge made November 1, 1982 that he was working for Nutter, a nonsignatory employer. Choate was a vice president and estimator and the parties stipulated that he was a Nutter supervisor within the meaning of Section 2(11) of the Act.

The ALJ decided these consolidated cases on September 27, 1983. He found that Shoux and Choate were supervisors within the meaning of the Act and thus natural and potential representatives of their employers for the purposes of collective bargaining and adjustment of grievances. He found the Union fines of these members to be violations of Section 8(b)(1)(B), even though the Union had no existing collective bargaining relationship with Nutter or Royal because he held the Union had an intent to represent the employees of those employers. The Union filed exceptions to these findings and conclusions, the NLRB adopted the ALJ's order on August 14, 1984, and on November 8, 1984 it applied to this court for enforcement of its order.

DISCUSSION

There are two prongs to our analysis of a Section 8(b)(1)(B) violation in such a case of union discipline. First we must determine the employment status of the disciplined union members because there can be no Section 8(b)(1)(B) violation unless the employees are supervisors and representatives of their employers for the purposes of collective bargaining and grievance adjustment. Second,

we must determine whether the union discipline restrained or coerced the employer in the selection of its representatives.

A. Supervisor Status

The question of supervisor status is a factual one and the determination of the Board is entitled to great deference and need only meet the substantial evidence test. *NLRB* v. *Sonoma Vineyards, Inc.*, 727 F.2d 860, 862 (9th Cir. 1984). Both parties stipulated that Choate was a supervisor within the meaning of the Act, as defined in Section 2(11). As to Shoux's status, the Union contends that his position was that of a working foreman lacking standard supervisory authority and that its fine thus fell within the acceptable parameters of discipline for doing bargaining unit work for a nonsignatory employer. *See Florida Power & Light* v. *IBEW*, 417 U.S. 790 (1970). The Board found that Shoux's duties of job assignments and lay-off decisions qualified him for supervisor status. There are specific evidentiary findings of Shoux's responsibilities supporting the determination of supervisor status. Thus, we affirm the Board's finding of supervisory status.

Supervisory status does not automatically mean that an employee is a representative of his employer for collective bargaining purposes. The Board's determination that Choate and Shoux were representatives derived from the application of two legal principles. One is that grievance adjustment is to be broadly interpreted to include adjustment of personal problems. *See Toledo Lithographers Locals 15-P and 272*, 175 N.L.R.B. 1072 (1969), *enf'd* 437 F.2d 55 (6th Cir. 1971). Applying this principle, the Board held Shoux was a representative because he occasionally handled employees' personal problems on the job.

To find Choate a representative, the Board applied its "reservoir doctrine," which states that anyone who is a supervisor within the meaning of § 2(11) is a part of the

"logical reservoir" from which an employer is likely to select his representatives for collective bargaining or grievance adjustment. The doctrine's development was explained by the Third Circuit in *Newspaper Guild, Erie Newspaper Guild, Local 187* v. *NLRB*, 489 F.2d 416 (3d Cir. 1973), which noted that the doctrine does not mean that every "§ 2(11) supervisor *automatically* become[s] a § 8(b)(1)(B) representative. Every case requires an evidentiary basis from which § 8(b)(1)(b) status may be inferred." *Id.* at 422. (emphasis in the original). The Supreme Court limited the applicability of the reservoir doctrine in *Florida Power & Light*, 417 U.S. 790 (1970). *See e.g. NLRB* v. *Rochester Musicians Association, Local 66*, 514 F.2d 988, 992 (2d Cir. 1975) ("*Florida Power* effectively undermined [the doctrine's] conceptual basis.") Today the doctrine requires that the inquiry focus on whether union sanctions "may adversely affect the supervisor's performance of his collective-bargaining of grievance-adjustment tasks and thereby coerce or restrain the employer contrary to § (b)(1)(B)." *American Broadcasting Companies, Inc.* v. *Writers Guild*, 437 U.S. 411, 430 (1978) ("*ABC*"). We defer to the Board's factual findings on this issue and affirm that Shoux and Choate were representatives of their employers.

B. Restraint or Coercion

Fines imposed on representatives may constitute prohibited coercion because the effect of the discipline may be to deprive an employer of the services of his representative. *ABC*, 437 U.S. at 433-437, 436 n.36. The general rule of *ABC* was announced in the context of an on-going strike, and this court has held that when a union does not represent or intend to represent the complaining company's employees there can be no Section 8(b)(1)(B) violation when a union disciplines members even if they are designated bargaining representatives. *NLRB* v. *Inter-*

ternational Brotherhood of Electrical Workers, 714 F.2d 870, 871-72 (9th Cir. 1980) (*Chewelah*). We believe *Chewelah* controls and is dispositive of the issue in this case.

The central question is whether the union demonstrated an intent to represent the employees of the nonsignatory employers. This is a factual inquiry reviewable by the substantial evidence standard. *Sonoma Vineyards*, 727 F.2d at 862. Both parties agree that the Union did not have a collective bargaining relationship with Nutter or Royal. They disagree about whether it intended to represent their employees. The Union argues that it demonstrated a lack of intent to represent Nutter and Royal employees when it filed a disclaimer of interest on September 15, 1981. The Board held the Union demonstrated an intent to represent evidenced by the Union business manager's testimony that at the time the Union dissolved its collective bargaining relationship with the multi-employer group NECA, it wanted to bargain with a new association comprised of some former NECA members. Thus the Board attempted to distinguish *Chewelah* and found the Union's purpose in imposing the fines on its members was to force employers out of NECA and into bargaining with the Union on a different basis.

Although this factual inference is entitled to deference as "peculiarly the kind of determination that Congress has assigned to the Board," *ABC*, 437 U.S. at 432, even a deferential standard does not require us to accept an inference we find logically insupportable. We cannot follow the Board's leap from a general statement of organizing interest made in September 1981 and fines imposed in November and December 1982 to a conclusion that the Union thereby engaged in "a course of conduct designed to cause the 'good' employer-members of NECA to abandon NECA multi-employer bargaining and to bargain on a single employer basis or to form a new association" in

violation of Section 8(b)(1)(B). We hold that where a Union has filed a disclaimer of interest, and has made no subsequent organizing efforts, its discipline of members fully a year after the termination of the bargaining relationship between the Union and the employers cannot reasonably be construed as an effort to restrain or coerce the employer. We require some evidence of specific overt acts such as picketing, handbilling, making statements of interest to the employers, or passing out opposition cards to find a desire to represent these particular employees.[1] Here there was no evidence of such an intent, but only a stale general statement, made at the time the collective bargaining relationship with NECA was terminated, that the Union would like to bargain with a new association. Since we might posit that a generalized desire to bargain is an essential characteristic of all unions, we require something more to support a specific finding of intent to represent.

C. Judicial Notice

We need not reach the final issue raised in the Union's appeal from the Board's order. The Union contends that the ALJ improperly took judicial notice of evidence contained in decisions reached in other cases arising from the same general situation and involving the Union and other contractors as parties. Because we have found the ALJ did not have sufficient evidence to support his conclusion about the Union's intent to represent, we need not decide whether he abused his discretion in relying upon the evidence developed in other hearings.

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[1] The specified acts are cited as representative only and are not intended to be all inclusive.

CONCLUSION

We deny enforcement of the NLRB's order because although we agree with the Board's determination of Choate's and Shoux's status as representatives of their employers, we do not find sufficient evidence of the Union's intent to represent the employees in this case.

APPENDIX B

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340 AND HAROLD E. NUTTER, INC. AND ROYAL ELECTRIC COMPANY. CASES 20-CB-5717, 20-CB-5781, AND 20-CB-5825

14 AUGUST 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 27 September 1983 Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel, the Respondent, and the Charging Parties filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.

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[1] The complaints allege and the parties stipulate that Harold E. Nutter, Inc. and Royal Electric Company are California companies engaged in electrical contracting and that in the normal course and conduct of their business each annually purchases, either directly or indirectly, materials and supplies valued in excess of $50,000 from suppliers located outside the State of California. Accordingly, Harold E. Nutter, Inc. and Royal Electric Company are employers engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Brotherhood of Electrical Workers, Local 340, Sacramento, California, its officers, agents, and representatives, shall take the action set forth in the Order.

DECISION

Statement of the Case

Jay R. Pollack, Administrative Law Judge. I heard these consolidated cases in trial on July 28, 1983, at Sacramento, California. The cases arose as follows: Harold E. Nutter, Inc. (Nutter Electric) filed a charge in Case 20-CB-5717 on November 22, 1982, against International Brotherhood of Electrical Workers, Local 340 (Respondent or the Union). On December 22, 1982, the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent. The charge in Case 20-CB-5781 was filed against Respondent by Royal Electric Company (Royal Electric) on February 8, 1983. On March 11, the Regional Director issued a complaint and notice of hearing against Respondent in Case 20-CB-5781 and an order consolidating that case with Case 20-CB-5717 for purpose of hearing. Thereafter, Nutter Electric filed the charge in Case 20-CB-5825. On May 11, the Regional Director issued a complaint in Case 20-CB-5825 and an order consolidating that case for trial with the two prior cases.

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preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Issues

The principal questions presented for decision were:

1. Whether Albert L. Schoux (Royal Electric) and Melvin K. Miller (Nutter Electric) were supervisors within the meaning of Section 2(11) of the Act and whether Schoux, Miller, and James K. "Ted" Choate (Nutter Electric)[1] were representatives of their employers for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

2. Whether Respondent violated Section 8(b)(1)(B) of the Act by fining Choate, Schoux, and Miller for working for their respective employers.

All parties were given full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the entire record, and from my observation of the demeanor of the witnesses and after due consideration of the briefs filed on behalf of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

1. Jurisdiction

Royal Electric and Nutter Electric are electrical contractors doing business in the Sacramento, California area. The parties stipulated that Royal Electric meets the Board's standard for asserting jurisdiction based on the direct and indirect inflow standards.[2] The parties further stipulated that Nutter Electric meets the Board's indirect inflow standard for asserting jurisdiction. Accordingly, I find Royal Electric and Nutter Electric to be employers engaged in commerce and in businesses affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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[1] The parties stipulated that Choate was a supervisor within the meaning of Sec. 2(11) of the Act for Nutter Electric.

[2] See generally *Siemons Mailing Service*, 122 NLRB 81 (1958).

II. The Labor Organization Involved

The complaint alleges, the answer admits, and I find that Respondent has been, at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Background*

National Electrical Contractors Association, Inc., Sacramento Valley Chapter (NECA) is an association of employers engaged in electrical contracting which has as one of its purposes the representation of its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations. Respondent and NECA had a collective-bargaining relationship for approximately 40 years. The last collective-bargaining agreement between Respondent and NECA expired May 31, 1981. On June 11, 1981, Respondent commenced a strike against the employers in the NECA multi-employer bargaining group, including Nutter Electric and Royal Electric.[3] On September 15 the Union sent NECA a disclaimer of interest which provided:

> On behalf of Local Union 340, IBEW, this letter shall serve as, and constitute a disclaimer of interest by IBEW Local Union 340 in representing, for purposes of collective bargaining or any other purpose, the employees of the multi-bargaining unit previously established and consisting of the employees of the

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[3] At the time the strike commenced, there were approximately 55 employers in the NECA bargaining unit. Although Respondent argues that Royal Electric was not part of the multiemployer bargaining group, the uncontradicted evidence shows that all parties, NECA, Respondent, and Royal Electric, treated Royal Electric as part of the group from March 1981 until at least September 1981 when Respondent disclaimed interest in the NECA bargaining group.

> employer-members of the Sacramento Valley Chapter, of the National Electrical Contractors Association, Inc., and other employers who have, from time to time, agreed to become part of the multi-employer bargaining unit. This disclaimer covers the employees covered by the Inside Wireman's Agreement, the Line Agreement, and the Material Handler's Agreement, and is intended to disclaim interest as to the multi-employer bargaining units or unit previously created by these three separate labor contracts.

On September 25, the Union filed 17 representation petitions in individual employer units for 17 employers, formerly in the NECA bargaining unit. No petition was filed for representation of the employees of either Nutter Electric or Royal Electric. The Regional Director administratively dismissed the 17 petitions on the basis that the appropriate bargaining unit was the multi-employer unit. On October 1 NECA signed a collective-bargaining agreement with the National Association of Independent Unions (NAIU), which agreement purported to cover the electrician employees of the employers previously involved in the negotiations between NECA and Respondent. Both Nutter Electric and Royal Electric adopted the NECA-NAIU agreement. On August 12, 1982, the Board directed a hearing on the issue of the continued existence or viability of the multiemployer unit. The Board order is reported as *Arden Electric*, 263 NLRB 318 (1982). The hearing in the representation cases closed on February 28, 1983, and the decision in that case is now pending before the Board.

On March 28, 1983, I issued a decision in *Electrical Workers IBEW Local 340 (Hulse Electric)*, JD-(SF)-55-83, in which I found, inter alia, that Respondent violated Section 8(b)(1)(B) of the Act by preferring charges against representatives of May Han Electric, d/b/a M & M Electric; Clint McCubbin, Inc.; Rex Moore

Electric Company; and Amos J. Walker, Inc., and by imposing fines against such representatives. That case is now pending before the Board on exception to my decision. On August 31, 1983, I issued my decision in *Grason Electric*, JD-(SF)-190-83, in which I found, inter alia, that Nutter Electric unlawfully assisted the NAIU by unlawfully soliciting its employees to sign dues-checkoff authorizations and by unlawfully deducting dues from the wages of employees prior to proper written authorization. In that case I dismissed, inter alia, an allegation that Nutter Electric had unlawfully recognized the NAIU as the exclusive bargaining representative of its employees. The Union was the charging party in the *Grason Electric* case. That case is pending before the Board as the time for filing exceptions to the decision has not yet expired.

The instant cases arise out of intraunion fines by Respondent against Melvin Miller and Ted Choate for working for Nutter Electric and Albert Schoux for working for Royal Electric. The General Counsel alleges that the fines of Miller, Choate, and Schoux violated Section 8(b)(1)(B) on the theory that all were natural and potential representatives of their employers for the purpose of collective bargaining and the adjustment of grievances. Respondent contends that the alleged supervisors did not possess the authority to bargain collectively or to adjust grievances and further that no violation could be found because the Union had previously disclaimed interest in representing the employees in the NECA multiemployer bargaining unit.

B. *Albert Schoux, Superintendent for Royal Electric*

1. Supervisory status

Albert Schoux has been employed as a superintendent by Royal Electric for approximately 2 years. In July or August 1982, Schoux was made superintendent on a job

for Royal Electric known as the Aerojet job. Shoux was completely in charge of the job. Thus, Schoux did all the hiring, firing, planning, and ordering for the job. Leo Velluntini, one of the owners of Royal Electric, placed Schoux in charge of the project and thereafter visited the project only for a final inspection. Schoux assigned employees to their job assignments and transferred employees to different projects on the jobsite. Schoux has recommended that employees be promoted to foremen and his recommendations have been followed. Foremen report to Schoux and have their manpower needs filled by Schoux. If Schoux needs more workers, he calls Royal Electric's office to see if workmen are available from other jobsites. If workmen are not available from other sites, Schoux is authorized to call NECA's hiring hall for additional employees. If the workload decreases, Schoux calls the office to see if employees can be sent to other jobsites of the Company. If there is no work at other sites, Schoux lays off the unneeded employees. It is Schoux who decides how many employees are needed, which employees to keep, and which employees to lay off.

Schoux works with the tools of the trade only 4 or 5 hours a week. Schoux uses the tools in order to inspect work done by the employees under his supervision. He is paid 50 percent more than the rate paid Royal Electric's journeymen electricians. Although there is no evidence that Schoux adjusts grievances under the collective-bargaining agreement, he does handle employees' personal problems on the job. Schoux has granted employees time off for personal reasons and on two occasions changed job assignments pursuant to requests from employees. One employee, not wanting to work at elevated heights, asked to be reassigned to a job station on a lower level of the building. Schoux had the employee switch assignments with another employee. On another occasion, an employee told Schoux that he was unable to perform an assigned

task and Schoux reassigned the employee to another job more in line with the employee's experience level.

Based on the foregoing facts, I find that Albert Schoux has been at all times material herein a supervisor of Royal Electric within the meaning of Section 2(11) of the Act. Respondent contends that Schoux has not engaged in collective bargaining or the adjustment of grievances and, therefore, is not protected by Section 8(b)(1)(B) of the Act. However, under the Board's "reservoir doctrine," the Board interprets the term "representative for the purposes of collective bargaining or the adjustment of grievances" broadly so as to include all individuals who are supervisors within the meaning of Section 2(11) on the ground that such individuals form the logical "reservoir" from which the employer is likely to select his representatives for collective bargaining or grievance adjustment. See, e.g., *Toledo Lithographers Locals 15-P and 272 (The Toledo Blade Co.),* 175 NLRB 1072 (1966), enfd. 437 F.2d 55 (6th Cir. 1971). Recently, in *Teamsters Local 296 (Northwest Publications,* 263 NLRB 778, 779 fn. 6 (1982), the Board reaffirmed its adherence to the "reservoir doctrine" and its position that all supervisors within the meaning of Section 2(11) are representatives within the intent of Section 8(b)(1)(B).

Even without resort to the "reservoir doctrine," the evidence establishes that Schoux adjusted grievances as the Board defines that term. The evidence establishes that Schoux granted employees time off and resolved personal complaints or problems regarding job assignments. The Board has broadly interpreted the term grievances as used in both Section 2(11) and Section 8(b)(1)(B) so as to include not only contractual grievances but also personal grievances. *Typographical Union No. 529 (Hour Publishing Co.),* 241 NLRB 310, 315 (1979); *Toledo Blade Co.,* supra.

2. The union discipline

Schoux is a member of IBEW Local 595, a sister local of Respondent, in Oakland, California. On December 20, 1982, Charles Lux, a member of Respondent, filed intra-union charges against Schoux for working on Royal Electric's Aerojet jobsite on December 14. Lux testified in this proceeding that he saw Schoux working with the tools for 2 or 3 days on the Aerojet jobsite.[4] However, Lux further testified that he saw Schoux working for 15–20 minutes mounting a disc connection on a concrete pillar and based on that he inferred that Schoux was working for 2 or 3 days. Further, Lux testified that Schoux was wearing a tool pouch when, in fact, Schoux never wears a tool pouch because of a back injury. Schoux testified that he did not install any disc connections or perform any electrical work on the Aerojet job. According to Schoux, he was inspecting the switch gear on a high voltage transformer pad when he was approached by Lux on the jobsite. In my opinion, Lux testified as to his subjective impressions and did not testify in an objective manner. I find Schoux's testimony to be more reliable and, accordingly, I credit Schoux's testimony over that of Lux.[5]

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[4] Lux was employed by another electrical subcontractor when he observed Schoux on the job.

[5] The fact that Schoux worked 4 or 5 hours a week with the tools of the trade does not detract from his supervisory status. See, e.g., *E.E.E. Co.*, 171 NLRB 982 (1968); *Penco Enterprises*, 201 NLRB 29, 31 (1973).

In cases involving discipline of supervisors for crossing a picket line, the Board inquires into whether the supervisors performed more than minimal amounts of rank-and-file work. See, e.g., *Typographical Union 101 (Washington Post)*, 242 NLRB 1079 (1979). However, in cases involving discipline for working for a nonunion employer, in a nonpicket line situation, the Board apparently does not inquire into the amount of rank-and-file work performed. See, e.g., *Painters District Council No. 36 Brown & Co.*, 259 NLRB 808 (1981). In any event, the record does not show that Schoux performed more than a minimal amount of rank-and-file work. Further, it does not appear that Respondent was concerned with Schoux's actual duties for Royal Electric.

On February 7, 1983, the Union's trial board found Schoux guilty of the charges brought against him by Lux. The trial board fined Schoux a total of $8200. On February 22, the IBEW, International (Respondent's parent organization) notified Schoux's home local, Local 595, of the discipline taken against Schoux by Respondent. Schoux did not appear at the trial board meeting and has not paid the fine levied against him. Although Schoux did not appear at the trial board meeting, he wrote the Union a letter prior to the trial board in which he notified the Union that he was a supervisor and that Royal Electric had filed the instant charge with the Board alleging that Respondent's conduct violated Section 8(b)(1)(B) of the Act. Apparently, the Union gave no consideration to Schoux's letter.

C. *Melvin Miller, Foreman for Nutter Electric*

3. Supervisory status

Melvin Miller has been employed by Nutter Electric for approximately 9 years. When Respondent went on strike in June 1981, Miller was working as a foreman on a job for Nutter Electric in Redding, California. The job in Redding was under the jurisdiction of IBEW Local 442, a sister local of Respondent. As the Redding job was unaffected by Respondent's strike, Miller worked for Nutter Electric until the completion of the job in the fall of 1981. Miller came back to work for Nutter Electric in late January 1982, after the Union had issued its disclaimer and after Nutter Electric had adopted the NECA-NAIU bargaining agreement.

Miller commenced work in January 1982 as the foreman for Nutter Electric at its electrical subcontract for the new contruction of a Mervyn's department store. The Mervyn's jobsite had no [p]roof and was shut down many days in early 1972 due to weather conditions. When weather did

not permit work at the Mervyn's jobsite, Miller filled in at another project for Nutter Electric known as the United Grocer's jobsite. At the United Grocers' jobsite, Miller continued to receive foreman's pay. However, on the United Grocer's jobsite, Miller worked as a journeyman electrician. According to Norman Nutter, Nutter Electric's president, Miller set the standard for the NAIU personnel and reported directly to Nutter Electric's management on the abilities of the foremen on the United Grocers' job. However, Miller had no supervisory authority while working on the United Grocers' job. Norman Nutter testified that because he wanted to avoid "jurisdictional" conflicts with the NAIU foremen, Miller was not given supervisory authority on the United Grocers' job. The main purpose of assigning Miller to the United Grocers' job was to "keep a paycheck coming in" when work was not possible on the Mervyn's job. Miller was assigned to the United Grocers' job by Ted Choate, vice president and estimator, when there was not enough work or because weather conditions did not permit work in the Mervyn's job.

At the Mervyn's jobsite, Miller had total responsibility for the job: ordering material, hiring and laying off employees, teaching employees, disciplining employees, and laying out or assigning work. Miller reported to Ted Choate, the estimator for the Mervyn's job. When Miller needed more employees he would call Choate, who would send employees from other Nutter Electric jobsites. If Miller did not have enough work for his crew, he would call Choate who would find work for the employees at other Nutter Electric jobsites or direct that the employees be laid off. Miller would decide which employees were to be retained and which employees were to be transferred or laid off. Choate visited the Mervyn's jobsite only three or four times within the 4–5 month construction period. Miller had the authority to grant employees time off and

to recommend employees for raises. Miller's recommendations for raises were followed. Miller had the authority to discipline employees and on one occasion discharged an employee. The discharged employee sought to appeal his discharge to Norman Nutter but Nutter referred the employee back to Miller. The employee then brought his NAIU business representative to speak with Miller in an attempt to obtain a reversal of the discharge decision. However, Miller decided not to take the employee back.

Based on the foregoing factors, I find that Miller was a supervisor for Nutter Electric within the meaning of Section 2(11) of the Act. I further find that Miller was a representative of Nutter Electric for the purpose of collective bargaining or for the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act. *Painters District Council No. 36 (Brown & Co.)*, 259 NLRB 808, 810 (1981); *Hour Publishing Co.*, supra. However, in the construction industry, individuals may be employed as supervisors on one job and as rank-and-file workers on the next.[6] Although Miller was paid as a foreman on the United Grocer's job, the evidence establishes that on that job he worked as a rank-and-file electrician and not as a foreman. Thus, my conclusions that Miller was a supervisor and an employer representative for Nutter Electric do not extend to Miller's status on the United Grocer's job.

2. The union discipline

Miller has been a member of Respondent for approximately 32 years. On March 2, 1982, J. Cox, a member of Respondent, filed charges against Miller for working for Nutter Electric at the United Grocer's job. Carl Monroy, a member of Respondent and a witness at the trial board

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[6] See, e.g., *Plumbers Local 137 (Hames Constr.)*, 207 NLRB 359 (1973); *Plumbers Local 725 (Powers Regulator Co.)*, 225 NLRB 138, 145 (1976); *Nassau & Suffolk Contractors' Assn.*, 118 NLRB 174, 180-181 (1975).

hearing on the charges against Miller, testified that he observed Miller working as an electrician on the United Grocers' job. Monroy testified that Miller was not a foreman on that job but rather took his orders from the foremen. Robert Ennis, a member of Respondent, similary testified that he observed Miller working on the United Grocers' jobsite as an electrician and not as a foreman. Ennis also testified against Miller at the Union's trial board hearing. Nutter Electric's records confirm that Miller was working on the United Grocers' jobsite on the date alleged in the charge against Miller. On May 4, 1982, Miller was notified that he was found guilty of "performing bargaining unit work while employed by Nutter Electric" and fined a total of $7,683.20. Miller did not pay the fine and on March 9, 1983, the Union brought suit in the Municipal Court of the State of California to collect the fine. The record does not reveal the present status of the lawsuit.

D. *Ted Choate, Vice President and Estimator for Nutter Electric*

Ted Choate did not testify at the instant hearing. The parties stipulated that Ted Choate is a supervisor of Nutter Electric within the meaning of Section 2(11) of the Act. Further the record shows that Miller, a supervisor and representative of Nutter Electric for purposes of collective bargaining or the adjustment of grievances, reported to Choate. Accordingly, as Choate is higher in the managerial hierarchy of Nutter Electric than Miller, it follows that Choate is also a natural and potential representative of Nutter Electric for the purposes of collective bargaining or the adjustment of grievance within the meaning of Section 8(b)(1)(B) of the Act.

On November 1, 1982, Lee Frith, Respondent's business manager, filed charges against Choate for "working for an employer who is no longer signatory to an IBEW agree-

ment with Local Union 340." On November 16, 1982, Choate was notified that the Union's trial board had found him guilty of the charges and fined him a total of $6000.

E. *The Bargaining Relationship*[7]

As mentioned earlier, the Union had a longstanding collective-bargaining relationship with NECA. Both Royal Electric and Nutter Electric were party to the NECA-Union negotiations of 1981. The 1978–1981 agreement expired on May 31, 1981. On June 10, the Union commenced a strike against NECA and its employer-members, including Nutter Electric and Royal Electric.

The strike was still in progress on September 15 when the Union sent its disclaimer letter. On September 16, NECA sent a telegram accepting the disclaimer. On September 25, the Union filed 17 representation petitions seeking to represent the employees of 17 NECA employer-members, not including Royal Electric and Nutter Electric. On October 1, NECA signed a collective-bargaining agreement with the NAIU. Seven of the employers involved in the representation cases, reached agreement with the Union permitting their employees to return to work about October 1. Thereafter, these seven employers signed separate collective-bargaining agreements with the Union in February 1982. Neither employer involved herein reached agreement with the Union. Rather, Nutter Electric and Royal Electric have both adopted the NECA-NAIU collective-bargaining agreement.

Between the Union's disclaimer of September 15 and NECA's execution of a collective-bargaining agreement with the NAIU on October 1, the IBEW, the Union's

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[7] In this section of the decision, I have taken judicial notice of the prior cases before me involving Respondent and NECA. See, e.g., *Meat Packers National*, 230 NLRB 222, 227 (1977); *Airlines Parking*, 197 NLRB 762 (1972).

parent organization, attempted to bring NECA and the Union back together again. On September 24, the Union's attorney wrote the IBEW's vice-president, for the geographic area which includes Sacramento, concerning the disclaimer. The attorney's letter contains,[8] inter alia, the following passage which sheds light on the Union's disclaimer:

> In late August and early September, Business Manager Frith asked me for advice concerning the legality of and procedures for disclaiming interest in the multi-employer bargaining unit represented by NECA. He asked me what impact a disclaimer would have on the NECA members and whether a disclaimer would free those NECA members who Frith felt wanted to bargain in good faith with Local 340. I understood then and now understand that the NECA negotiation committee and Board of Directors was and is dominated by employers who want to go non-union. Those NECA members who really wanted a fair contract and wanted to bargain in good faith had been kept out of the Negotiations and ignorant of the progress of negotiations. However, these same employers had signed a Power of Attorney with NECA to represent them and up to this point had not chosen to attempt to break away from the multi-employer unit and request individual bargaining.
>
> Brother Frith also inquired whether NECA could foster an RD election petition or file an RM election petition in an attempt to oust Local 340 from its position as bargaining representative. As you know, those NECA contractors who had shown their true colors at the bargaining table hired scab replacements during

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[8] The attorney's letter was received as an admission by a party opponent in both the *Hulse* and *Grason* cases.

the strike. In fact, NECA had already placed the newspaper ad for strike replacements *before* the strike was called and *before* impasse had been reached in negotiations.

I advised Brother Frith that a disclaimer of interest was legally possible, but would have to extend to the whole multi-employer bargaining unit. I advised him that a disclaimer would cause a halt to his strike and prohibit him from demanding further bargaining with NECA on a multi-employer basis.

Therefore, with this history of bad faith bargaining, lawsuits and NLRB charges, Brother Frith presented the matter of a disclaimer to the membership for its consideration. Although I was not asked to express an opinion as to the wisdom of disclaiming interest, it is my opinion that it was a realistic move to make considering the tactics employed by NECA and the possibility that the disclaimer would prompt the good contractors into action.

I further advised Brother Frith that the disclaimer would permit the individual employers to grant recognition to Local 340 on an individual basis and to bargain on a single employer basis.

However, I explained that the disclaimer would not have the effect of voiding the Power of Attorney. Should any employer wish to bargain individually with Local 340, it would still have to use NECA as its bargaining agent. Whether NECA would refuse to act on behalf of an employer on this basis (and whether the employer itself would seize this refusal as an opportunity to break the Power of Attorney) were matters for speculation.

In the instant hearing Frith, called as an adverse witness by counsel for Nutter Electric and Royal Electric, testified that after the disclaimer it was his intention to organize every electrical contractor that was willing to sign an

agreement with the Union. Frith further testified that it was the Union's first concern to organize the 17 employers for which petitions were filed and get an agreement and an association established before any plans were made to organize the other employers. According to Frith, after a new association was formed with the 17 employers, any other employer that was willing to become a part of the new organization would be welcome. Frith testified "ultimately down the road it was our hope that everybody would be back under an agreement." By means of leading questions, Respondents' counsel was able to secure an explanation from Frith that all Frith meant was that the Union could not turn down Royal Electric, Nutter Electric, or any other employer that requested to sign an agreement. According to Frith, aside from the general premise that the Union would sign a contract with any employer that requested an agreement, the Union had no desire to have a contract with Nutter Electric. Frith gave no reason or explanation why the Union sent its disclaimer letter.

On December 29, the Regional Director administratively dismissed the Union's 17 representation petitions. On September 12, 1982, in *Arden,* supra, the Board reversed the Regional Director and ordered that a hearing be held limited to the issue of the continuing existence of viability of the NECA multiemployer bargaining unit which the Regional Director had administratively found to be a bar to the 17 petitions. The consolidated representation hearing was consolidated with the unfair labor practice case, *Grason Electric,* supra. That consolidated hearing closed on February 28, 1983, and the representation cases were transferred to the Board in Washington, D.C., on that same date and are now pending before the Board for decision. In the unfair labor practice case, the Union charged, inter alia, that the collective-bargaining agreement between NECA and NAIU violated Section 8(a)(2) of the Act. The Union charged that Nutter and seven other

NECA employers violated Section 8(a)(2) by recognizing and bargaining with the NAIU. In my decision, which issued August 31, 1983, I noted that Respondent argued that NECA and Nutter had violated Section 8(a)(2) and (1) of the Act by recognizing the NAIU, a minority union, when the Union itself was the majority representative of the employees in the recognized bargaining unit.[9]

In my decision in the *Hulse* case, supra, which issued on March 28, 1983, I found that Respondent violated Section 8(b)(1)(B) of the Act by preferring charges against representatives of May Han Electric, d/b/a M & M Electric, Clint McCubbin, Inc., Rex Moore Electric Company, and Amos J. Walker, Inc., and by imposing fines against such representatives. In that case I found that the Union intended to withhold supervision from the employers in order to force the employers to come back to the Union. The Union would then be in a position to bargain with the employers on an individual basis rather than on a NECA multiemployer basis.

F. *Conclusions*

Section 8(b)(1)(B) of the Act provides that "it shall be an unfair labor practice for a labor organization . . . to restrain or coerce . . . an employer in the selection of his

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[9] The Union sought an order setting aside the entire collective-bargaining agreement between the NAIU and NECA. I found, inter alia, that NECA had unlawfully recognized the NAIU with regard to two employers for whose employees valid representation petitions were pending. I also found, inter alia, that Nutter Electric had lawfully recognized the NAIU. However, Nutter had assisted the NAIU by unlawfully soliciting dues-checkoff authorizations and by unlawfully deducting dues from the wages of some employees without proper written authorization. The unfair labor practice case was transferred to the Board upon issuance of my decision. If timely exceptions to the decision are not filed, the decision will be adopted by the Board and become its findings, conclusions, and Order.

representative for the purposes of collective bargaining or the adjustment of grievances." The applicable principles of law are set forth in *Plumbers Local 364,* 254 NLRB 1123, 1125 (1981):[10]

> Section 8(b)(1)(B) prohibits both direct union pressure—for example, strikes—to force replacement of grievance representatives and indirect union pressure—for example, union discipline of supervisor-members—which may adversely affect the chosen supervisors' performance of their representative functions. *American Broadcasting Companies* v. *Writers Guild of America West, Inc.*, 437 U.S. 411 (1978); *New Mexico District Council of the United Brotherhood of Carpenters and Joiners of America (A.S. Horner, Inc.)*, 177 NLRB 500, 502 (1965), enfd. 454 F.2d 1116 (10th Cir. 1972); and *Wisconsin River Valley District Council of Carpenters and Joiners of America, AFL-CIO (Skippy Enterprises, Inc.)*, 218 NLRB 1063, 1064 (1975), enfd. 532 F.2d 47(7th Cir. 1976).
>
> It is also well settled that union discipline of supervisor-members who cross a picket line or otherwise violate a union's no-work rule in order to perform their normal supervisory functions constitutes indirect union pressure within the prohibition of Section 8(b)(1)(B). In reaching this conclusion, the Board and courts have recognized that the reasonably foreseeable and intended effect of such discipline is that the supervisor-member will cease working for the duration of the dispute, thereby depriving the employer of the grievance adjustment services of his chosen representative. *American Broadcasting Companies,* supra, at 433-437 fn. 36; *NLRB* v. *International Union of Operating Engineers, Local Union*

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[10] See also *Painter District Council No. 36 (Brown & Co)*, 259 NLRB 808, 810-811 (1981).

No. 501, AFL-CIO, 580 F.2d 359, 360 (9th Cir. 1978); *A. S. Horner,* supra, 502; and *Skippy Enterprises,* supra, 218 NLRB 1064, enfd. 532 F.2d at 52-53. Such discipline is unlawful even where, as here, the supervisor defies the union and continues to work for the employer during the dispute; the discipline is unlawful because the supervisor, having been disciplined for working during a labor dispute, may reasonably fear further discipline and, hence, will be deterred from working during any future disputes. The employer, in such circumstances, must either replace the disciplined supervisor or risk loss of his services during a future dispute; in either event, the employer is coerced in the selection and retention of his chosen grievance adjustment representative. *American Broadcasting Companies,* supra, 433-437.

In light of the foregoing principles, Respondent's discipline of Schoux and Choate, because they worked for nonsignatory employers, would appear to restrain and coerce the instant two employers in the selection and retention of their grievance adjustment representatives.

Respondent's discipline of Miller for working on Nutter Electric's United Grocers' jobsite presents a different situation. As discussed above, it is not uncommon in the construction industry for an individual to be employed as a rank-and-file worker on one job and as a supervisor on the next. Here, Miller, a supervisor, was fined for conduct he engaged in while working as a rank-and-file employee. The General Counsel and the Charging Parties argue that during the time period from March 2, when Miller was charged by the Union, until May 4, when the fine was imposed, Miller worked only 29 percent of the time on the United Grocers' jobsite. However, I find this argument unpersuasive since there is no evidence that any portion of the discipline was imposed because of Miller's work on any jobsite other than the United Grocers' jobsite. As dis-

cussed above, on this jobsite Miller worked as a rank-and-file employee. The reasonable and foreseeable consequences of such discipline does not restrain or coerce Nutter Electric in its selection or retention of supervisors. Nor does this discipline interfere with Miller's performance of his representative functions. The reasonable consequence of the Union's action is that Nutter Electric must employ Miller in a supervisory capacity if it intends to use Section 8(b)(1)(B) as a shield from union discipline. Section 8(b)(1)(B) does not prevent intraunion discipline of rank-and-file employees. It is well settled that a union may fine an employee-member for crossing a picket line or otherwise violating a union's no-work rule. See. e.g., *NLRB* v. *Textile Workers Local 29,* 409 U.S. 213, 217 (1972); *Machinists Local 405* v. *NLRB,* 412 U.S. 84 (1973). Accordingly, for the reasons discussed above, I shall recommend that the complaint in Case 20-CB-5825, which pertains to the Union's discipline of Miller, be dismissed.

Respondent, relying on the decision of the United States Court of Appeals for the Ninth Circuit in the *Chewelah Contractors* case,[11] argues that no violation of Section 8(b)(1)(B) can be found because the Union did not have a collective-bargaining agreement or a collective-bargaining relationship with either of the employers at the time Schoux and Choate engaged in the conduct for which they were fined.

In *Chewelah Contractors,* the court, in refusing to enforce the Board's finding of a violation of Section 8(b)(1)(B), stated that the purposes of the section were to prevent unions from forcing employers into or out of multiemployer bargaining units and to guarantee that an employer's bargaining representative would be completely faithful to the employer's desires. The court noted that in

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[11] *NLRB v. Electrical Workers IBEW Local 73* (Chewelah Contractors), 621 F.2d 1035 (9th Cir. 1980), denying enf. 231 NLRB 809 (1977).

any decision involving Section 8(b)(1)(B) that had come to its attention, the charged union had been the bargaining representative of the complaining company's employees. However, the charged union in *Chewelah Contractors* neither represented the company's employees nor demonstrated a desire to represent the employees. The court reasoned that the union had no incentive to influence the company's choice of representative or affect the member's loyalty to the company. Thus, the court held that a union does not violate Section 8(b)(1)(B) by disciplining a member, even though that member is also the bargaining representative of an employer if the union neither represents nor shows an intent to represent the employer's employees.

In *Plumbers, Local 364,* supra at 1126-27, the Board concluded that the Ninth Circuit's decision in *Chewelah* was in conflict with a long line of Board cases, and that the Board's position appeared to have the support of the United States Supreme Court and the opinions of other circuit courts:

> . . . in *American Broadcasting Companies, Inc.* v. *Writers Guild of America, West, Inc.*, supra, the Supreme Court affirmed the Board's finding that the union (which represented writers in the film industry) violated Section 8(b)(1)(B) by threatening to discipline and by disciplining various supervisors—including directors—who worked during the writers' strike. It was undisputed that the directors—who supervised other employees and adjusted other employees' grievances—never dealt with writers and did not adjust Writers' grievances. In the Supreme Court, the union argued that the threats and discipline directed toward the directors could not possibly affect their adjustment of writers' grievances and that therefore the union's actions regarding the directors had not violated Section 8(b)(1)(B).

437 U.S. at 437, fn. 37. The Supreme Court explicitly rejected the union's contention, noting that "directors . . . had [grievance] adjustment duties with respect to other employees" and finding that the union's sanctions made the directors "less than completely reliable and effective employer representatives for the duration of the strike, and less likely to perform any supervisory task during future strikes." *Id.* The court then concluded: "A union may no more interfere with the employer's choice of a grievance representative with respect to employees represented by other unions than with respect to those employees whom it itself represents." 437 U.S. at 438, fn. 37.

The Union involved in *Writers Guild* did, of course, represent the employer's writing employees and, thus, had a bargaining relationship with the coerced employers. However, the Supreme Court also made clear that its rationale applied equally in circumstances where the union did not represent the employees of the coerced employer. Thus, the Supreme Court endorsed the Board's decision in *A. S. Horner, Inc.*,[7] finding an 8(b)(1)(B) violation where the respondent union did not represent the employees of the coerced employer. Referring with approval to a D.C. Circuit opinion[8] discussing *Horner*, the Supreme Court stated (437 U.S. at 436 fn. 36):

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[7] *New Mexico District Council of Carpenters (A. S. Horner, Inc.)*, 177 NLRB 500 (1969), enfd. 454 F.2d 1116, 1118 (10th Cir. 1972).

[8] *International Brotherhood of Electrical Workers, Local 134, International Brotherhood of Electrical Workers, AFL-CIO [Florida Power & Light Co.]* v. *N.L.R.B.*, 487 F.2d 1143, 1155, fn. 19 (1973), affd. 417 U.S. 790 (1974).

> The [D.C. Circuit] noted its agreement with [Horner] where a union member worked as a supervisor for a company which had no contract with the union . . . . A fine imposed in these circumstances violated [Section 8(b)(1)(B)] because compliance by the supervisor with the union's demands would have required his leaving his job and thus have the effect of depriving the Company of the services of its selected representative for the purposes of collective bargaining or the adjustment of grievance . . . . The [D.C. Circuit] said that *Horner* thus "falls close to the original rationale of 8(b)(1)(B) which was to permit the employer to keep the bargaining representative of his own choosing." 159 U.S. App. D.C., at 284, fn. 19, 487 F.2d at 1155, fn. 19.

Furthermore, in addition to the Supreme Court's decision in *Writers Guild* and the Tenth Circuit's decision enforcing the Board's order in *A. S. Horner,* at least two other courts of appeals have approved Board findings of 8(b)(1)(B) violations where the respondent union had no bargaining relationship with the employer involved. See *International Organization of Masters, Mates and Pilots International Marine Division, ILA, AFL-CIO;* and *Union De Trabajordores De Muelles Y Ramas Anexas, Local 140 [Marine & Marketing International Corp.]* v. *NLRB,* 486 F.2d 1271, 1274 (D.C. Cir. 1973), cert. denied 416 U.S. 956 (1974); *International Organization of Masters, Mates and Pilots Marine Division, International Longshoremen's Association, AFL-CIO* v. *NLRB,* 539 F.2d 554, 559-560 (5th Cir. 1976), cert. denied 434 U.S. 828 (1977). Both the D.C. Circuit and the Fifth Circuit decisions were cited with approval by the Supreme Court in *Writers Guild,* 437 U.S. at 438, fn. 37.

Even assuming that the rationale of *Chewelah* should be applied to the present case, a violation of the Act would still be found. In *Chewelah* the court found that since the union did not represent Chewelah's employees nor demonstrate a desire to represent the employees, the union had no incentive to either influence Chewelah's choice of bargaining representative of affect the supervisors' loyalty to Chewelah. In this case the Union evidenced reasons to influence the employers' choice of bargaining representatives and to affect the supervisors' loyalty to their employers.

While the Union disclaimed interest in representing employees in the NECA bargaining unit, it sought representation in single employer units of 17 NECA represented employers. Lee Frith's testimony at this proceeding reveals that Respondent intended to bargain with a new association comprised of these 17 employers. Thereafter, Respondent desired to have the other employers join the new association.

In the *Hulse* case, supra, I found that the Union intended to withhold supervision from the employers in order to force the employers to come back to the Union. The Union would then be in a position to bargain with the employers on an individual basis rather than on a NECA multiemployer basis. Here, Frith indicated that the Union sought to bargain with a new association and have the other employers join or adopt the new association's agreement. Thus, *Chewelah* is distinguishable because the Union continued to desire to represent the employees of the employers albeit not in the NECA multiemployer unit. More importantly, one of the Union's purposes was to force the employers out of the NECA multiemployer bargaining and into bargaining on a single employer basis or new association basis. A union's attempt to force an employer to resign from a multiemployer bargaining association was recognized as an 8(b)(1)(B) violation by

the Court in *Chewelah*. See 621 F.2d at 1036, citing *Roofers Local 36 (Roofing Contractors)*, 172 NLRB 2248 (1968). Thus, even under the rationale of *Chewelah*, Respondent's fining of the Supervisors as part of a course of conduct designed to cause the "good" employer-members of NECA to abandon NECA multiemployer bargaining and to bargain on a single employer basis or to form a new association, is a violation of Section 8(b)(1)(B) of the Act.

CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) and Section 8(b) of the Act.

2. Royal Electric and Nutter Electric are employers engaged in commerce and in businesses affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. Albert Schoux (Royal Electric) and Ted Choate (Nutter Electric), at all times material, were supervisors for their respective employers within the meaning of Section 2(11) of the Act and employer representatives within the meaning of Section 8(b)(1)(B) of the Act.

4. By preferring charges against Schoux and Choate, and imposing fines against them, Respondent restrained and coerced the above-named Employers in the selection and retention of their representatives for the purposes of collective bargaining and the adjustment of grievances, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The General Counsel has not established that Respondent has violated the Act in imposing discipline

against Melvin Miller for working on Nutter Electric's United Grocers jobsite.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

Respondent, International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO, its officers, agents and representatives, shall

1. Cease and desist from

(a) Restraining or coercing Royal Electric and Nutter Electric in the selection of their representatives for purposes of collective bargaining or the adjustment of grievances by preferring charges, holding a trial, fining, or otherwise disciplining any such representative performing supervisory, managerial or grievance-adjustment functions for said Employers.

(b) In any like or related manner restraining or coercing Royal Electric and Nutter Electric in the selection of their representatives for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action designed to effectuate the purposes of the Act.

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[12] All outstanding motions inconsistent with this recommended Order are hereby denied. In no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Rescind and expunge from its records all disciplinary action taken against Albert Schoux (Royal Electric) and Ted Choate (Nutter Electric), including the fines, because of their working as supervisors and employer representatives, and notify Schoux and Choate, in writing, that the fines levied against them have been rescinded and that all records of disciplinary action against them have been expunged.

(b) Post at its business office and meeting halls copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Mail to the Regional Director for Region 20 signed copies of said notice for posting by the Employers, if those companies are willing, in places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations of the complaint in Case 20-CB-5825 are hereby dismissed.

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[13] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce Nutter Electric or Royal Electric in the selection of their representatives for purposes of collective bargaining or the adjustment of grievances by preferring charges, holding a trial, fining, or otherwise disciplining any such representative performing supervisory, managerial or grievance-adjustment functions for said Employers.

WE WILL NOT in any like or related manner restrain or coerce Nutter Electric or Royal Electric in the selection of their representatives for the purpose of collective bargaining or the adjustment of grievances.

WE WILL rescind and expunge from our records all disciplinary action taken against Albert Schoux (Royal Electric) and Ted Choate (Nutter Electric), including the fines, because of their working as supervisors and employer representatives, and notify Schoux and Choate, in writing, that the fines levied against them have been rescinded and that all records of disciplinary action against them have been expunged.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL UNION 340, AFL-CIO

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NORTHERN CALIFORNIA

No. 84-7769
NLRB Nos. 20-CB-5717, 5825, 5781

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340, RESPONDENT.

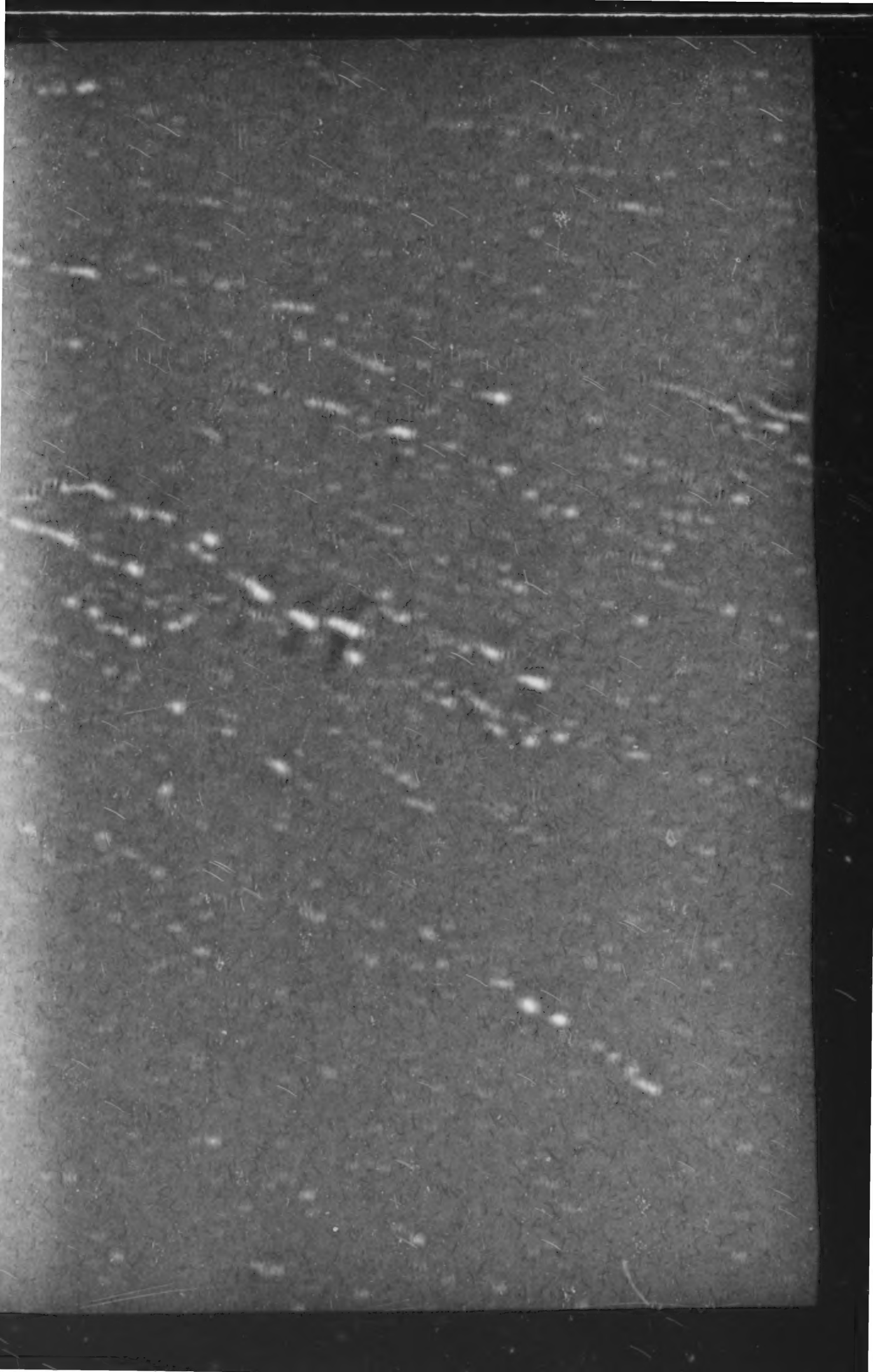
Upon Application For Enforcement of an Order
of the National Relations Board

JUDGEMENT

This Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board and was duly submitted

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the application for enforcement of the order of the National Labor Relations Board in this Cause be, and hereby is DENIED.

Filed and entered: Jan. 22, 1986



Supreme Court, U.S.
FILED
JUL 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1924

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 340,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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---

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The citations to the decisions below, the basis of this Court's jurisdiction, the relevant statutory provisions and a statement of the case are set at pp. 1-5 of the petition for a writ of certiorari filed by the National Labor Relations Board ("NLRB" or "the Board") and are therefore not repeated here.

REASONS FOR DENYING THE WRIT

Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B) ("NLRA" or "the Act"), makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The question posed here is whether that section reaches union conduct that is not

intended to and cannot affect the integrity of the collective-bargaining process but that may have the incidental effect of denying non-union employers the services of union members as supervisors. The court below held that § 8(b)(1)(B) does not stretch that far. Nothing in the Board's petition justifies further review of that eminently sound holding.

In point one we show that the situation presented here is qualitatively different than the class of situations Congress intended to regulate in enacting § 8(b)(1)(B), and that the Board's petition provides no support in the legislative materials for broadening that section beyond its stated purpose. In point two we demonstrate that the NLRB is wrong in claiming that the decision below is inconsistent with the decisions of this Court and that the NLRB's claim of a conflict among the circuits was refuted by the Board itself just three years ago in the course of successfully opposing a petition for a writ of certiorari in *IBEW Local 323 v. NLRB*, 464 U.S. 950 (1983).

1. As the Board acknowledges in its petition, § 8(b)(1)(B) "was intended to prohibit unions from dictating '"who shall represent an employer in the settlement of employee grievances'" or compelling '"the removal of a . . . supervisor who has been delegated the function of settling grievances."'" NLRB Pet. at 7 n. 5, *quoting Florida Power & Light Co. v. Electrical Workers*, 417 U.S. 790, 798 (1974), *quoting* S. Rep. 105, 80th Cong. 1st Sess. 21 (1947). That being so, it is common ground in this case that a union which is engaged with an employer in the collective bargaining process violates § 8(b)(1)(B) by exerting coercive pressure on the employer with respect to the employer's choice of his bargaining representatives.

In *NLRB v. Electrical Workers Local 73 (Chewelah Construction Co.)*, 621 F.2d 1035 (9th Cir. 1980), the Ninth Circuit by a parity of reasoning recognized that

the concerns underlying § 8(b)(1)(B)—concerns relating to the integrity of the collective-bargaining process—are implicated only "when the union charged with influencing an employer's choice of bargaining representatives is the bargaining representative of that employer's employees." *Id.* at 1036. Concluding that § 8(b)(1)(B) was not intended to extend further and interdict legitimate union action that is "not inherently destructive of an employer's right to choose a loyal bargaining representative," such as enforcement of a union rule designed to minimize wage competition by requiring union members to work only for unionized employers, the Ninth Circuit in *Chewelah* held that § 8(b)(1)(B) should not be read to proscribe union enforcement of rules against supervisor-members if the supervisor works for an employer whose employees "the union neither represents nor shows an intent to represent." *Id.* at 1037.

In the instant case, the NLRB held that the respondent union violated § 8(b)(1)(B) by fining several members for working for non-union employers even though a year before the fines were imposed respondent had disclaimed any interest in representing the employees of those employers and in the ensuing year respondent had made no attempt to represent those employees. To the Board it was sufficient to find a § 8(b)(1)(B) violation that the union discipline could make it more difficult for the non-union employers to recruit union members to serve in a supervisory/grievance-adjusting capacity. *See* Pet. App. 9a-37a. The court below denied enforcement of the NLRB's decision, however, concluding that its prior decision in *Chewelah* was "control[ling]" and "dispositive of the issue in this case." Pet. App. 6a.

The Board points to nothing in the legislative materials to suggest that § 8(b)(1)(B) was intended to have the sweeping effect that the Board's decision in this case affords to that section. Nor does the Board dispute in any way the Ninth Circuit's conclusion that the evils

against which § 8(b)(1)(B) was avowedly aimed are far removed from the type of conduct *Chewelah* upholds, *viz.*, union enforcement of a rule against working for non-union employers. And given the "strong labor policy favoring the association of employees to eliminate competition over wages and working conditions," *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 622 (1975), the Board fails to posit a theory which would justify imputing to Congress the unexpressed intent to achieve the results the Board attributes to § 8(b)(1)(B)—results that run directly contrary to that "strong labor policy" by precluding enforcement of a union rule that prohibits union members from aiding and abetting the efforts of non-union employers to undermine union standards.

2. The Board advances two principal arguments in support of its petition for a writ of certiorari. First the Board claims that the decision below "is inconsistent with . . . this Court's decision" in *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411 (1978) ("ABC"). *See* NLRB Pet. at 6. And second the Board contends that the decision below "is in direct conflict with the decision of the Eleventh Circuit in *NLRB v. IBEW, Local Union No. 323*, 703 F.2d 501, *cert. denied*, 464 U.S. 950 (1983)." NLRB Pet. at 6.

(a) Contrary to the Board's assertion there is no conflict between *ABC* and the decision below; indeed the issue posed here is entirely separate from the question decided in *ABC*.

As the Court stated at the very outset of its opinion in *ABC*, "[T]he issue in th[e *ABC*] litigation [w]as whether a labor union commits an unfair labor practice when it disciplines a member who is a supervisory employee for crossing the union's picket line during a strike [against an employer whose employees the union represents] and performing his regular supervisory duties, which include the adjustment of grievances." 437 U.S. at 413. That issue arose because in *Florida Power &*

Light v. Electrical Workers, supra, the Court had held that a union acting as a collective bargaining representative may discipline a supervisor-member who crosses a picket line to perform *rank-and-file* work for the employer. The lower court in *ABC* read *Florida Power & Light* to apply as well to such a union's discipline of a supervisor who crosses a picket line to perform *purely supervisory work* for the employer.

Given the nature of the controversy in *ABC*, the Court in that case devoted its opinion to exploring the limits of *Florida Power & Light* and to explaining why the lower court had misinterpreted that decision. The *ABC* Court had no occasion to address the entirely separate issue posed in the instant case: whether § 8(b)(1)(B) reaches union conduct that *cannot affect the integrity of the bargaining process* because the conduct, at most, affects employers with whom the union has no present or prospective bargaining relationship.

The NLRB bases its claim that the decision below conflicts with *ABC* on language in the final footnote in the *ABC* opinion. There the Court disposed of the contention of the union in that case, which represented writers, that its discipline of director-supervisors was permissible because the director-supervisors did not "deal[] with writers or adjust[] their grievances." 437 U.S. at 437 n. 37. The Court rejected that argument because "[a] union may no more interfere with the employer's choice of a grievance representative *with respect to employees represented by other unions* than with respect to those employees whom it itself represents." *Id.* (emphasis added).

The NLRB seeks to extract from this sentence the conclusion that the existence *vel non* of a bargaining relationship is irrelevant under § 8(b)(1)(B). But as the emphasized portion of the quoted language shows, the ABC footnote faithfully carries out Congress' purpose in assuring that the employer will be represented by his agent and not by a union agent in collective bargaining

and grievance-arbitration. The *ABC* footnote does not speak to the situation presented here in which the union does not represent *any* employees of the employers for whom the disciplined supervisor-member works and in which the union's discipline therefore does not threaten to undermine any collective bargaining relationship.

In short, the issue decided below is not answered by *ABC*. Thus the NLRB is wrong in contending that the decision below is inconsistent with *ABC*.

(b) The alternative ground the Board offers in support of its petition is that the decision below "is in direct conflict," Pet. at 6, with the Eleventh Circuit's decision in *NLRB v. IBEW Local 323*, *supra*. The Board argues that *Chewelah* conflicts with the Eleventh Circuit's decision in *Local 323*, and that because the Ninth Circuit in the instant case adhered to *Chewelah* this "conflict between the Circuits . . . continues to persist." Pet. at 11.

When the union in the *Local 323* case sought review in this Court of the Eleventh Circuit's decision just three years ago, the Board had no difficulty in reconciling the views of the Ninth and Eleventh Circuit. Opposing the union's petition for certiorari in *Local 323* the Board argued as follows:

> There is no merit to petitioner's contention that the court of appeals' decision here conflicts with the Ninth Circuit's decision in *Chewelah*. The Ninth Circuit in *Chewelah* found that the disciplining union lacked a representation interest in the employer's employees and therefore held that its discipline of the employer's supervisor for working nonunion did not violate Section 8(b)(1)(B). Here, by contrast, as the court of appeals observed, the record suggests that petitioner 'may indeed have had an interest in representing [the employer's] employees;' there was evidence that [the union] daily approached electrical employees and asked them to sign its working agreement, that the [union] had requested recognition from [the supervisor's employer], and that, just before

> [the union] filed its second set of charges against [the supervisor], he had refused [the union's] business manager's request that [the supervisor] sign [the union's] working agreement. [NLRB Br. in Opp. in No. 83-63 at 6-7 n.4] [1]

---

[1] In its petition in the instant case, the NLRB claims (at 11 n.9) that one of the grounds on which the Agency opposed certiorari in *Local 323* was that "the conflict with *Chewelah* was not clear because the Ninth Circuit in *Chewelah* had not precisely delineated its requirement of a representation interest." The Board goes on to argue that "[a]ny uncertainty about the Ninth Circuit's standard has been dispelled by its opinion in this case and thus it is now clear that the Ninth and Eleventh Circuits have adopted irreconcilable standards." *Id.*

In truth, however, the *only* argument the Board in *Local 323* offered to defeat the petitioner's claim of a circuit conflict was the assertion that the Eleventh Circuit's decision was consistent with the Ninth Circuit's requirement of a "representation interest"; the Board's brief in *Local 323* did not doubt the existence or meaning of such a requirement in the Ninth Circuit. This is clear from the quotation in text from that brief which represents the full discussion in the brief of the circuit-conflict issue.

Nor is there any merit in the Board's suggestion that the decision below somehow adds clarity to *Chewelah* and has resulted in a conflict that did not previously exist. *Chewelah* could not have been clearer in holding that "[a] union does not violate Section 8(b)(1)(B) by disciplining a member, even though that member is also the bargaining representative of an employer, if the union neither represents nor shows an intent to represent the employer's employees." 621 F.2d at 1037. The Board's decision in the instant case recognizes this and expressly disagrees with *Chewelah*. And the appellate court's decision denying enforcement to the Board's order merely reaffirms *Chewelah* and applies it to the facts of this case. Indeed, the court below stated its holding here in the narrowest of terms:

> We hold that where a Union has filed a disclaimer of interest [of representing the employees of the disciplined supervisor] and has made no subsequent organizing efforts, its discipline of members fully a year after the termination of the bargaining relationship between the Union and the employers cannot reasonably be construed as an effort to restrain or coerce the employer. [Pet. App. 7a]

In light of the NLRB's opposition in *Local 323*, this Court decided not to issue a writ of certiorari to review the Eleventh Circuit's decision. 464 U.S. 950. Nothing that has happened in the ensuing three years justifies a different course in this case.[2]

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[2] The Board claims that the decision below "conflicts in principle" with rulings by three other circuits which, according to the Board, "demonstrate that the gravamen of a § 8(b)(1)(B) violation is the deprivation of an employer's representative, whether or not the union has a specific representational interest." Pet. at 10-11 n.8. The cases the Board cites all pre-date *Local 323*, yet the Board did not find the supposed "conflict in principle" between these cases and the Ninth Circuit sufficient to warrant this Court's attention at that time.

Moreover, the cases on which the Board relies do not address the "principle" on which the decision below rests, *viz.*, that union coercion that does not affect a present or prospective collective bargaining relationship does not violate § 8(b)(1)(B). In *NLRB v. New Mexico District Council of Carpenters (A. S. Horner)*, 454 F.2d 1116 (10th Cir. 1972), the union disciplned a supervisor who worked for a non-union company less than a month after the union had lost a representation election at that company. And in *International Organization of Masters v. NLRB*, 539 F.2d 554 (5th Cir. 1976), *cert. denied*, 434 U.S. 828, and *International Organization of Masters v. NLRB*, 485 F.2d 1271 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 956, the courts concluded that union attempts to coerce an employer into hiring union members as supervisors where the union also represented some of the employer's employees are unlawful even if the union's aim is to further the well-being of its supervisor-members (by securing jobs for them) and not to affect the manner in which the supervisors perform their supervisory duties.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 85-1924

Supreme Court, U.S.
FILED
AUG 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1924

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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

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REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Respondent does not seriously dispute the existence of a conflict between the Ninth and Eleventh Circuits on the central issue in this case: whether union discipline of a supervisor-member violates Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B), where the union does not represent or have an intention to represent the employees of the supervisor-member's employer. Rather, respondent contends that the petition should be denied because the Board opposed certiorari in the Eleventh Circuit case (*NLRB* v. *IBEW, Local Union No. 323*, 703 F.2d 501, cert. denied, 464 U.S. 950 (1983)) and "[n]othing that has happened in the ensuing three years justifies a different course in this case" (Br. in Opp. 8 (footnote omitted)).

Although, as we have explained (Pet. 11 n.9), the Board had reasonable grounds for opposing the petition for a writ of certiorari in *Local Union No. 323*, three Members of the Court disagreed. See 464 U.S. at 951 (White, J., joined by Brennan, J. and Blackmun, J., dissenting from denial of cert.). In the decision below, the Ninth Circuit has shown that it will continue to adhere to its position, first enunciated in *NLRB* v. *IBEW, Local Union No. 73 (Chewelah)*, 714 F.2d 870 (1980), that a representational interest is required, and that it would not find a violation of Section 8(b)(1)(B) in circumstances where the Eleventh Circuit would. The now-clear conflict on a substantial and recurring issue in the administration of the Act requires resolution by this Court. Moreover, as our petition points out (Pet. 12 n.10), the issue continues to arise in new cases that would be controlled by the Ninth Circuit's rule.[1]

2. Respondent asserts also (Br. in Opp. 6) that "the NLRB is wrong in contending that the decision below is inconsistent with" this Court's decision in *American Broadcasting Cos.* v. *Writers Guild (ABC)*, 437 U.S. 411 (1978). Respondent's position (Br. in Opp. 2) is that Section 8(b)(1)(B) proscribes union discipline of supervisor-members with grievance-handling or collective bargaining responsibilities only if the union "is engaged with [the] employer in the collective bargaining process." Respondent argues (Br. in Opp. 5-6 (emphasis in original)) that *ABC* is not inconsistent with that position or with the decision below for two reasons: (1) because *ABC* did not involve "the situation presented here in which the union does not represent *any* employees of the employers for whom the disciplined supervisor-member works" and (2) *ABC* did not

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[1]In *NLRB* v. *IBEW, Local Union No. 46*, No. 85-7146 (9th Cir. July 1, 1986), the Ninth Circuit, adhering to its *Chewelah* rule, upheld the Board's finding that union discipline of a supervisor-member for working for a nonunion employer violated Section 8(b)(1)(B) because there, unlike here, the union was seeking a contract from the employer.

decide whether Section 8(b)(1)(B) reaches union conduct affecting the choice of supervisors by employers in the absence of a "present or prospective bargaining relationship."

But the lesson of *ABC* is that Section 8(b)(1)(B) is to be read in accordance with its language and its legislative history, neither of which limits its reach to discipline by a union that has or seeks to have a collective bargaining relationship with the employer. *ABC* involved union discipline of supervisor-members who did *not* supervise, or adjust grievances involving, employees represented by the union. Rejecting a claim that the lack of "nexus" between the discipline and the union's representation meant there was no violation, the Court held that Section 8(b)(1)(B) may be violated by conduct that "may adversely affect" either a supervisor's actual performance of collective bargaining or grievance adjustment tasks, *or* his willingness to serve in such a capacity (437 U.S. at 430, 436). The unlawful effect is no less clear where the union seeks to prevent a supervisor-member with collective bargaining or grievance adjustment functions from working for an employer with which it has no relationship; for in that case as well "compliance * * * with the union's demands would have * * * 'the effect of depriving the [employer] of the services of its selected representative for the purposes of collective bargaining or the adjustment of grievances.' " *ABC*, 437 U.S. at 436 n.36 (quoting *New Mexico District Council of Carpenters (A.S. Horner, Inc.)*, 177 N.L.R.B. 500, 502 (1969), enforced, 454 F.2d 1116 (10th Cir. 1972)).[2] Thus, although

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[2]In this case, for example, the employer had a bargaining relationship with a union other than respondent (Pet. 3), and the effect of respondent's discipline was to coerce the employer in the selection of its representatives in that relationship. That conduct violates Section 8(b)(1)(B) because, as this Court made clear in *ABC*: "[a] union may no more interfere with the employer's choice of a grievance representative with respect to employees represented by other unions than with respect to

the facts in *ABC* may not be identical to those presented here, the principles underlying that decision support the Board's position that a union may violate Section 8(b)(1)(B) even though it has no representational interest in the employees of the coerced employer. Both respondent and the court below have ignored those principles in taking a contrary view that focuses on the union's motivation rather than on the potential effect on the employer.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

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AUGUST 1986

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those employees whom it itself represents" (438 U.S. at 439 n.37). Moreover, even if the employer were nonunion and it vested a supervisor with the function of handling employee grievances, a union would violate Section 8(b)(1)(B) if its discipline of that supervisor had the effect of depriving the employer of his services.

This Court's citation of *A.S. Horner*, a case in which the union violated Section 8(b)(1)(B) by fining a supervisor-member because he worked for a nonunion employer, further confirms that the reach of Section 8(b)(1)(B) is not limited to cases where the disciplining union has a collective bargaining relationship with the coerced employer. Although, as respondent notes (Br. in Opp. 8 n. 2), the union in *A.S. Horner* had lost a Board-conducted election several months earlier, the Board's rationale in that case, which was approved by the Tenth Circuit, did not turn on that fact but rather on the circumstance that compliance by the supervisor with the union's demands would have had the effect of depriving the employer of the services of its selected representatives for the purposes of collective bargaining or the adjustment of grievances.

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1924

In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Petition for Writ of Certiorari filed May 22, 1986
Certiorari granted October 6, 1986

15912P

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1924

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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III

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

IN THE MATTER OF:
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL 340 BOARD CASE NOS. 20-CB-5717,
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Date	Documents
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08.14.84	Decision and Order
11.08.84	Application for Enforcement
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05.22.86	Petition for writ of certiorari filed
10.06.86	Petition for writ of certiorari granted

BEFORE THE
NATIONAL LABOR RELATIONS BOARD,
TWENTIETH REGION

Case Nos. 20-CB-5717, 20-CB-5781, 20-CB-5825

IN THE MATTER OF:
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL 340, RESPONDENT,

AND

HAROLD E. NUTTER, INC., CHARGING PARTY,

AND

ROYAL ELECTRIC COMPANY, CHARGING PARTY.

Room W-2142
Federal Building
2800 Cottage Way
Sacramento, California

Thursday, July 28, 1983

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 a.m.

BEFORE: HON. JAY R. POLLACK
Administrative Law Judge

APPEARANCES:

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[11] * * *

MS. WATSON: It was also moved that judicial notice be taken of the Decision of Administrative Law Judge Jay R. Pollack in JD-SF-5583, International Brotherhood of Electrical Workers, Local Union 340 and Hulse Electric, M & M Electric, Clint McCubbin, Rex Moore, Amos J. Walker, Inc., and Peters Electric—the Decision is dated March 28, 1983—and the facts as found therein.

MS. SURE: That is opposed by the Respondents here. For purposes of expediting the proceedings we will stipulate to one section of the Decision, referred to as "Background", if that will be of any assistance in expediting this proceeding.

We would oppose based on relevance taking judicial notice of an entire Decision, which deals with other facts in that we would have no opportunity to object to some of those facts as being relevant to the instant case. But, if [12] you turn to page four, "Background", we could stipulate to—under Section A—

JUDGE POLLACK: So, that's Section A, "Background", which—

MS. SURE: Up until the last two paragraphs of Section A. So, Section A on page four and the first two sections of

Section A on page five. But that would be all that we would be willing to have included in this record as background.

JUDGE POLLACK: Well, you know, obviously I can take judicial notice of the Decision, but I would like to know for what purposes you want me to take notice so that the Respondent has an opportunity to defend.

MS. WATSON: Obviously, I would like you take notice of the facts, of course, in the "Background" section so that we do not have to litigate these facts again since we've already litigated the background before.

JUDGE POLLACK: But, hasn't Ms. Sure taken care of that by her willingness to stipulate to those facts?

(Pause.)

MS. WATSON: I would also like to have judicial notice taken of the facts in Section J on page 24, the bargaining relationship; and in Section K the conclusions regarding Section 8(b)(1)(b) violations. By Section K I'm not asking for the legal conclusions and the legal analysis [13] therein, but merely the facts that are set forth in that section as they don't seem to be set forth otherwise in the Decision, in the background section or anywhere else.

(Pause.)

MS. SURE: Do you want our position, Judge?

JUDGE POLLACK: Yes.

MS. SURE: With respect to the sections under J and K, again, these are all conclusions drawn from facts which the Judge found relevant apparently to the case under Hulse in the consolidated cases then. They deal directly with those employers, directly with facts which entered into with respect to those employers, none of which would be relevant to the instant employers.

And, the only areas arguably relevant would be the mere background facts that we entered into, which are again

just reargued here on page 24. And I say argued again because they are argued in the light most favorable to the Decision written by the Judge in this case.

They are not set forth in an objective statement of facts as the background was. And any fact—again, as I have relayed both to the Counsel for the General Counsel and Counsel for the Charging Parties—if we shown at any point testimony or some document which either believes is relevant to the instant case then we can be given the opportunity to argue relevancy here or stip it in as an [14] undisputed fact.

But, that's not the case here. I don't have the facts, these are the conclusions drawn from them.

MS. WATSON: I would note that the facts were fully set forth and litigated with a full opportunity for Respondent to dispute those facts—

MS. SURE: Then we will dispute them again here.

MS. WATSON: —as evidence in the earlier trail.

JUDGE POLLACK: Well, isn't that the particular problem? You know, to start off with the facts really dealing with other employers. And you want to use some of the facts that pertain to other employers to argue in this case and the Union's position would be that I can't draw any inferences from incidents involving the Local Union and other employers.

MS. SURE: For instance, if Counsel for the General Counsel offers a stipulation that no Representation Petition was filed on either Royal or Nutter I can stipulate to that as an undisputed fact. For instance, if we can identify what exactly is wanted or desired in this case with respect to the 17 Petitions I can enter into a stipulation that would make it clearer.

JUDGE POLLACK: I take it there is no issue as to when the disclaimer was filed and the contents of the disclaimer is set forth in the Decision?

[15] MS. SURE: No.

JUDGE POLLACK: I take it the conversations dealing with Rex Moore you feel are irrelevant to this case and the conversations dealing with persons employed by McCubbin, M.S. Walker, etcetera?

MS. SURE: Precisely.

And, I would raise all of this in objections again. But, in a sense of just wholesale bringing-in a record from another case, especially a record in its conclusary findings here—you know, based on the facts as were found by the Judge at that point—would not be giving us the opportunity to argue on the exact facts.

JUDGE POLLACK: Well, but generally when you're talking about judicial notice of a Decision with facts in them if the party had a chance to litigate it in the first instance—which you did, you have the initial record before you in the Hulse case and were a party in that case—what would be the impediment to taking judicial notice?

MS. SURE: Because there might be different relevancy objections in this case.

JUDGE POLLACK: Okay.

MS. WATSON: I think it should be noted that it is our position that all of these cases arise out of the same dispute and are related. And this is why we had asked for them to be consolidated and this is why we believe that there [16] is possible relevance for some of the facts as brought out in the earlier trial as to other employers.

JUDGE POLLACK: Well, as pointed out, I'll take judicial notice of the Decision and particularly those matters in "Background" because they don't seem to be at issue.

But, it seems to me that if you want to go beyond that, in order to be fair to the Respondent I will have to require you to be more specific so they know exactly what it is that you're relying on in the other record so they are given full opportunity to defend it, explain it, etcetera.

MS. SURE: That would be our position, without meaning at all to be dragging this thing out unduly. If we can be shown exactly what facts it is that—

JUDGE POLLACK: Trying to balance both interests here, I think that's the best way to do it. I'll require the General Counsel to be more specific about what facts she wants me to take judicial notice of so that you will have your chance to defend or explain.

MS. WATSON: Other than in the Background Section A, correct?

JUDGE POLLACK: Well, there doesn't seem to be any dispute regarding those facts, which include the disclaimer and—but if you want to rely on conversations or communications [17] between the Union and employers other than Nutter and Royal, or anything along those lines, I think you have to be more specific so that Respondent can defend that in this case if it so chooses.

MS. SURE: With respect to the background we can further—since the background here was, again, designed to speak to the employers in the instant case, I can offer the stipulation that the 17 Representation Petitions would not include Royal Electric or Nutter Electric.

MS. WATSON: I will stipulate to that.

MR. NOVOTNY: So stipulated.

JUDGE POLLACK: Fine.

* * *

[19] ALBERT L. SCHOUX, JR.

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE POLLACK: Give us your name and address for the record and spell your last name, please?

THE WITNESS: My name is Albert L. Schoux, Jr. and it's spelled S-C-H-O-U-X. And I reside at 16247 Jerico Road, Grass Valley.

DIRECT EXAMINATION

BY MS. WATSON:

Q Mr. Schoux, who are employed by?

A Royal Electric.

Q How long have you been with Royal Electric?

A Off and on for two years.

Q How long have you been employed with Royal recently?

A Through the Aerojet job, a year.

Q When you were first hired by Royal Electric what was the position that you were hired for?

A Superintendent.

* * *

[20] Q You have worked this last time for Royal for approximately the last year, is that correct?

A Yes, off and on.

Q And, you were hired as?

A Superintendent.

Q When you were hired by Royal the last time were you told what your job duties and your job authority would be?

A Yes, I was.

Q Who told you this?

A Frank and Leo Velluntini.

Q Who are Frank and Leo Velluntini?

A The owners of Royal Electric.

Q And, what did they tell you about your job duties and authority?

A They asked me if I would oversee their jobs as far as material handling, hiring, material ordering, general running on the jobs.

Q Were you hired at that time for a specific job?

[21] A Yes, at that time it was Aerojet.

Q And, when did you first start on the Aerojet project?

A It was roughly about November of 82.

Q Prior to the Aerojet project you have worked for Royal before, is that correct?

A Yes.

Q In what capacity had you worked for them before?

A Superintendent also

Q What jobs did you work on prior to that?

A It was the County Jail Annex at 7th and I.

Q When was the County Jail job?

A That was approximately between—let's see, September through December of 81.

Q Were your job duties or your authority any different on the County Jail job than they were later on in the Aerojet job?

A No.

Q How many employees did you have under your supervision at the County Jail?

A Six.

Q Would you describe for us what kind of project the Aerojet job was?

A Well, basically it was three contracts. When I started out there we had a small vacuum pump project going for McBride. And during the process of that job we picked up [22] a substation for Building 2009 and then right after that we received a contract for the relighting for Building 2009.

Q Were these three contracts ongoing at the same time?

A Yes, they were.

Q And, who was in charge of the three contracts?

A I was.

Q Had any of them started by the time you were hired for the Aerojet job?

A No.

Q So when you first started on the Aerojet job what was the first thing that you did as far as getting the job going?

A Usually we will proceed to the job site and inspect the facilities and double-check to make sure everything is disconnected so that no personal injury could evolve.

Q Did you—was there a general contractor on that job?

A Yes, there was. One particular job, we were general on the other two.

Q Who was general on the third one?

A We were, the large one.

Q One of the jobs—

A The second and third both, we were general.

Q On the first one there was a different general contractor?

A Yes, we were for a mechanical contract for McBride.

[23] Q Did you consult with McBride before you started work on the Aerojet job?

A Yes, on those jobs you have to work through the general contractor.

Q Did you have any Foreman under you at the Aerojet project?

A No.

Q Now, when you were given the Aerojet project by Leo or Frank Velluntini what did they tell you to do about this job?

A They told me I had complete coordination with them through the shop and that I was completely in charge of all the hiring, firing and the necessary paperwork as far as laying the job out.

Q Did they give you the plans and the specifications?

A Yes, they did.

Q How were employees hired for the Aerojet job?

A Through the referral hall.

Q Did you interview any employees?

A Usually I interviewed them first thing they were at the job.

Q Had they been interviewed before that, do you know?

A Usually through the shop.

Q Did you go through any resumes of employees that were to be sent to the job?

[24] A No, most of them come out of the hiring hall.

Q What did you do when a new employee came out to the job site?

A Usually I had a discussion with them as far as his capabilities and the type of work he had done prior.

Q When the Aerojet job first began what was your responsibility as far as materials and supplies and equipment?

A It was primarily just coordinating the labor and material between Royal Electric and Aerojet.

Q Who ordered the material for the job?

A Primarily most of the material was supplied by Aerojet. We did have a small amount of material. But any material that is requested on the job I do.

Q How would you go about requesting some material that you needed?

A I would call the office and talk to the Material Expediter.

Q Did you have to clear your orders through Leo or Frank?

A No.

Q Did you ever have to order any large amounts of equipment for that job after the job was started?

A Not usually. The bulk of the material is usually ordered upon receiving a contract.

Q Did you lease or rent any equipment while you were on [25] the Aerojet job?

A Yes.

I leased high-lift equipment from Sierra Crane.

Q And, how did you go about doing that?

A Well, my first day on the job I noticed that he had quite a bit of equipment, he had a total of six pieces. And I approached him and asked him if he would be interested in subleasing some of the equipment back to us. And he said, yes, he would be interested.

So I called Frank Velluntini and suggested that he notify Sierra Crane and make arrangements with them.

Q Did Frank dispute the need for such equipment?

A No.

Q Did you have to order any tools on this Aerojet job?

A Small electrical tools are usually supplied by the shops.

Q And, how did you order them if you needed them?

A Through the Purchases Agent, Material Handler.

Q Did you have to order any tools through Aerojet?

A No, they didn't supply any tools at all.

Q When you ordered tools through the Material Expediter—is that what you said?

A Yes.

Q Did you have to clear your orders through Frank or Leo?

[26] A No.

Q What about fixtures and conduit and wire, who did you order those from?

A Primarily that was all furnished by Aerojet.

Q Who determined how much was to be ordered and when it was needed?

A I did.

Q And, did you check with the office before you ordered these things from Aerojet?

A No.

Q Now, when you were on the Aerojet job what were your daily duties?

A Usually mostly layout and order the material and schedule the men as far as their duties.

Q Would you describe for us exactly what you mean by laying out the work?

A Well, what I usually try to do, you know, in a twenty-four period is to coordinate myself with the plans and specs and arrangement of the job so I could put the proper men in the proper places to be productive.

Q Did you actually physically layout any work that was done on that job?

A No.

Q Who did that?

A Nobody. I just—usually what I do is I draw them [27] a sketch or something like that of what I want done if it goes into any detail at all.

Q And you give it to an employee, a Journeyman?

A Yes.

Q Did you confer with the—did Aerojet have an Engineer on the site?

A Yes, they had an on-site Coordinator to inspect it.

Q And, did you confer with him?

A Yes, quite often.

Q How often would you say that you conferred with him?

A On a weekly basis probably six to eight hours.

Q Do you know if he conferred with anyone else in Royal Electric about problems on the job?

A No.

Q While you were on the Aerojet job did you make any changes to the plans as you already had them?

A Yes.

Q And, what kind of changes did you make?

A Well, originally it was a tight-scheduled job and we moved 1500 existing fixtures and put up 700 new ones. And, due to the process of removing, the way manually we would have to do it and the limited amount of time, I had

to cut the channel. Therefore I suggested that we weld the channel back in eight foot lengths and prewire it and put it back up, which speeded the job up considerably.

[28] Q Was this procedure called for in the plans?

A No.

Q Before you did this procedure did you get permission from Frank or Leo to make this change?

A No, I didn't.

Q Did you consult with the Aerojet Engineer about it?

A Yes.

Q Did he okay the change?

A Yes, he did.

Q While you were on the Aerojet job did Royal have any subcontractors on the job?

A Yes, we did.

Q And, who was this?

A B & A.

Q And, what were your responsibilities as far as B & A?

A Just to coordinate my work with them as far as pulling the high voltage cable and the make-up in the transformer pads.

Q How did you have to arrange your work to take into account B & A's work?

A The problem was that we had to have a shutdown on the high voltage cable. So what we had to do was coordinate the productivity on the job to match the scheduled shutdown the second week of December. They scheduled a major shutdown at Aerojet. So, I had to coordinate all of my work around [29] that particular time so the cable would be there and they would be on the job in that week to do that amount of work needed.

Q Did you have to clear this arrangement with Frank or Leo?

A No, they were aware of it.

Q While you were on the Aerojet job who had responsibility for any safety problems or safety complaints?

A I did.

Q Did you have any of these kinds of problems on that job?

A Petty. The biggest one was getting the guys to keep their hardhats on.

Q Who was responsible for telling them to keep their hardhats on?

A I am.

Q And—

A I'm also liable.

Q Did you ever have anyone who made any kind of safety complaint to you?

A None.

Q Did you have anyone who ever complained that he didn't want to work up high or something like that?

A Yes, I had one individual who said he was scared of heights. So I took him off the main lift and put him on the [30] ground.

Q Did you have to clear that with anyone?

A No.

Q While you were on the Aerojet job did you keep a job journal?

A Yes, I did.

Q How often did you keep this journal?

A Daily.

Q And, what went into it?

A Primarily man hours and any visitors or any conversations with the inspectors, material ordered.

Q Did you do any other paperwork?

A Safety meeting once a week.

Q What about change orders?

A On that job it was pretty much cut and dry.

A Why was that?

A Well, it went in a pretty well inspected plan.

Q Who handled the timesheets and the payroll reports for employees on that job?

A I did. On a weekly basis.

Q Were you the one who logged their hours?

A Yes.

Q Did Aerojet have an on-site inspector?

A Yes.

Q And, did he ever order any changes made to your order [31] after he had inspected it?

A Just a few time he requested that we—we were in the process of removing fixtures and he requested that we put some additional fixtures up temporarily.

Q What did you do about that?

A Accomodated him.

Q Did you check with the office before you did it?

A No, I didn't.

Q How much of your time in an average week out at the Aeroject job would you estimate that you spent dealing with the plans and specifications?

A Probably ninety-five percent of it.

Q Where was this work done with the plans and specifications?

A At Building 2009.

Q Did you have an office in there or a desk or trailer or anything?

A I had a small desk inside the trailer.

Q And, where were the men working in relation to where you would work with the plans?

A All over. The building covered seven and a half acres, so they were widely spread.

Q Now, you said you had three contracts out at Aeroject for which you were responsible?

A Yes.

[32] Q What was the range of employees, the number of employees you had on each project?

A Basically I didn't have any particular number on one project. I had to shift them around from job to job depending on the schedule. It would range anywhere from three to ten.

Q So, you had at various times as many as ten people working on the three projects combined?

A Right.

Q When you switched people around from one job to another did you have to clear this with anyone?

A No, I didn't.

Q How did you decide whether to switch them from one place to another?

A Experience.

Q The employee's experience?

A No, mine.

Q Did you also take into consideration the employee's experience and job skills?

A Always.

Q If you needed extra employees on the job what did you do?

A Usually notified the office.

Q And, what would they do?

A Usually call the referral hall. Or I could call directly myself, either way.

[33] Q Directly to the referral hall?

A Yes.

Q Did you do that at all on the Aerojet job?

A I can't recall right off.

Q When you called the office and asked for employees did you ever ask for anyone by name?

A Yes, some of the local guys that I'm, you know, familiar with.

Q Were you ever refused anyone that you asked for by name?

A No.

Q Did Frank or Leo ever dispute your judgment as to who you asked for?

A There was one particular case, Bruce, which he has a bad leg and they thought it might be rather hard for him to get up and down the high lift equipment. And I just explained to them that there would be no difficulty because once he got on it he would be there to stay.

Q And then was he dispatched to your job?

A Yes, he was.

Q If you had too many employees on the job what did you do in that situation?

A Usually I would call the office to see if they had work other places.

Q And, if they didn't have any work for these employees [34] what would you do?

A I would either send them home or lay them off.

Q Who decided the number of employees that were needed to do the job at any given time?

A I did.

Q Did Frank or Leo ever question you as to the numbers?

A Never.

Q And, if you had to lay someone off how did you do that?

A I would just call the office and talk to the secretary and give her the amount of time and have her write a check and deliver it, or I would go and pick it up.

Q If there were any personal problems on the job who took care of those?

A I did.

Q Did you ever have any problems with employees drinking on the job?

A Yes, I had one individual.

Q And, what did you do about that?

A I just got him aside and I told him that either he was going to stop the drinking or he was going to be terminated.

Q And, what happened?

A He agreed that he would not drink prior to the job.

Q Did the problem straigten itself out?

[35] A Yes, it diid. He was with me right to the end.

Q Did you check with Frank or Leo before you warned him about the problem?

A No.

Q Have you ever had any problems with employees being late?

A Yes.

Q And, what did you do about that?

A Docked them.

Q How did you go about doing that?

A It was usually ten or fifteen minutes late and I would just keep track of the amount of time he was late and I would deduct it from his pay.

Q Did you get any permission to do that before you did it?

A No.

Q Did you give him any warnings about being late?

A Yes, I did.

Q And, what happened?

A He ignored them.

Q Was this person finally laid off?

A No, he's still with the firm.

(Pause.)

Q Now, when you had the three projects going out at Aerojet I believe you've already said you switched employees [36] around from one project to another. Did you have to clear this with anyone?

A No.

Q What were the reasons for switching them?

A Well, usually because when you've got three jobs going at the same time your material flow changes on a day to day basis and the demands of the job. So, I would

have to pull part of the crew off of the lighting to set a piece of switch gear or pull some cable or—you know, whenever that particular material arrived on the job site.

Q Have you ever fired anyone?

A No, we usually just lay them off.

Q What do you mean exactly by laying them off.

A Just terminate them, just tell them that we're out of work.

Q Have you ever sent anyone back to the office or called the office and said, "I dont want them on my job anymore"?

A No.

Q Would you have the authority to do that?

A Yes, I would.

Q Did you authorize any overtime for the Aeroject job?

A Not to my recollection, no.

Q Have you authorized overtime on other jobs?

A None.

* * *

[37] Q Do you have the authority to authorize overtime?

A Yes, I do.

Q And, do you have the authority to decide on the job [38] who would be the employees who work the overtime?

A Yes, I do.

Q Do you have the authority to decide when the overtime would be worked?

A Yes, I do.

Q Now, on the job do you inspect the work which has been done by the employees?

A Upon completion.

Q And, how do you go about doing this?

A Usually I would have to go in and open up the necessary panels and fixtures and equipment to make sure it's connected properly.

Q How much of your time would you say—on the Aerojet job, for instance—that you spent doing that?

A On a weekly basis probably four hours.

Q Have you ever recommended that anyone be promoted of given a raise?

A Yes.

Q And, do you recall who that was?

A Yes. Jack McAtee, who is still presently with us. Now he's running his own job.

Q And, what did you recommend him for?

A Foreman's position.

Q Have you ever recommended that anyone be promoted from say, Class III to Class II?

[39] A Yes. There was one individual, Stan Hyden.

Q And, who did you make the recommendation to?

A To both Frank and Leo.

Q And, was he promoted?

A Yes, he was.

Q And, Mr. McAtee that you were just referring to, he was promoted to Foreman, is that correct?

A Yes, he was.

Q Did you make that recommendation also to Frank and Leo?

A Yes.

Q Have you ever granted anyone any time off for personal reasons such as illness?

A Yes.

There was an instance at Aerojet where McAtee had to have a knee operation. And he asked me if it would be possible to take four days off and I said, yes, that there was no problem, that I could work somebody in around him.

Q And, how did you get someone else to replace him for those days?

A Usually just call the shop to see if there was anybody available to fill in for that amount of time.

Q Did you clear it with Frank or Leo before you told him he could have the four days off?

A No.

[40] (Pause.)

Q Now, since the—when was the Aerojet job over.

A Let's see, it would be about February 20, 1983, somewhere in there.

Q And, have you worked for Royal since that time?

A Yes, I have.

Q Are you currently working for Royal?

A Off and on.

Q What have been the jobs that you have done for Royal since the Aerojet job?

MS. SURE: Objection; irrelevant.

The fine occured to my knowledge in December of 1982. I don't see any need to get anything—

JUDGE POLLACK: I thought it was January of 1983.

MS. SURE: I think the actual charge—

MS. WATSON: The citation was in December of 82, I believe, and the fine was in January of 83.

JUDGE POLLACK: Oh, okay. I'm sorry, you're right. Why then would we be concerned with times after that?

MS. WATSON: Well, just for his continuing supervisory authority.

JUDGE POLLACK: All right, go ahead.

THE WITNESS: Yes, I presently just finished a job out at Data Drive, short term.

[41] BY MS. WATSON:

Q What was your position on that job?

A To layout and coordinate.

Q Have you ever worked for Royal in any other job capacity than what you worked for them as at Aerojet or now?

A No.

Q Have you ever worked at Royal as a Journeyman?

A No.

* * *

[42] Q Do you recall what happened on December the 14th of 1982?

A Yes.

It was approximately about eight-thirty in the morning and I was out inspecting some switch gear on the high voltage transformer pad. And, this gentleman came up and asked me who I was with. And not knowing who he was or anything I said Royal Electric and he turned and walked away.

Q Did you know this person?

A No, I didn't.

Q And, exactly what were you doing at the time?

[43] A I was inspecting the high voltage secondary buss tie-ins to the switch gear.

Q Was this work that was already completed?

A No.

Q You were inspecting work-in-progress?

A Yes.

Q Did this person ask you what you were doing?

A No.

Q Did he ask you—

MS. SURE: Objection.

He stated that the extent of the conversation was, "Who are you working for?", he answered, and the person left.

JUDGE POLLACK: All right, go ahead.

(Pause.)

BY MS. WATSON:

Q Do you have the authority to fire an employee on the job if the need arose?

A Yes, I do.

Q Would you have to clear that decision with anyone in the office?

A No, I would not.

Q What would you do if you had to fire anyone?

A I would just call for his check.

Q When you were out on the Aerojet job who estimated that job?

[44] A I believe Frank did.

Q How often did he visit the job site?

A He was out there twice.

Q When was that?

A First starting-in on the job and at the final inspection.

Q Did anyone else—did Leo ever visit the site?

A Yes, Leo came out one time.

Q Do you know the purpose for his visit?

A He just wanted to see how the job was going together, not being familiar with it.

Q So, neither one of them visited on a regular basis?

A No.

Q When you first began the Aerojet job did you have a job walk?

A Yes.

Q Who was involved in that?

A Myself and Frank.

Q Was anyone from Aerojet involved?

A Yes, the Engineers and also the Coordinator.

Q Was that one of the times that Frank visited the job site?

A Yes.

Q How are you paid, are you paid on an hourly basis?

A Yes, I am.

[45] Q What classification are you?

A I'm not really done by class.

Q Do you know how your pay compares to other employees that you have worked with?

A At the present rate it's fifty percent above Journeyman.

Q So, am I correct in understanding you make fifty percent –

A More than a Journeyman Electrician, right.

Q Do you know if anyone else in Royal makes comparable rate to your's?

A No.

Q Is there anyone else at Royal Electric with a comparable job to your's?

A No.

Q There are other Foremen, is that correct?

A Yes.

Q Are there other permanent Foremen?

A There's no such thing as a permanent Foreman.

Q But, there's no one else whose job duties are comparable to your's?

A No.

MS. WATSON: I have no further questions.

MR. NOVOTNY: May I have just a minute?

JUDGE POLLACK: Okay.

[46] (Pause.)

DIRECT EXAMINATION (cont.)

BY MR. NOVOTNY:

Q Did you meet with any Aerojet representatives on a regular basis?

A Yes.

Q How often?

A Usually once a day with the Coordinator.

Q What did you typically discuss with him?

A Material flow and I wanted their opinion of how the job was going and if they had any grievances as far as safety and production.

Q Did you transfer any employees at the Aerojet job upon their request to different jobs?

A Usually in contact with the office, if they needed a man or two to fill in on another job I would.

Q Did any employee ever come to you on that job and request a different assignment?

A Yes.

Q And, what did you do?

A I just put them, you know, where I basically thought he would handle the job okay.

Q How many times did this happen?

A Just once.

JUDGE POLLACK: That's the person you told us about [47] who didn't want to work up high?

THE WITNESS: No, this was another individual.

BY MR. NOVOTNY:

Q Can you explain that circumstance?

A Well, he was just incapable of doing his job at the time that I requested and he said he didn't know how. And I asked him at that particular time what type of work he had done before. And he told me and then I just relocated him somewhere else, a less difficult job.

Q Did you transfer another employee to his job?

A Yes.

* * *

CROSS EXAMINATION

BY MS. SURE:

Q Mr. Schoux, you've been an IBEW member for approximately twenty-four years?

[48] A Yes.

Q And, when you became an IBEW member you took the oath of the IBEW, did you not?

A Yes, I did.

Q And, at that time you agreed to be bound to the Constitution as the contract between the member and the Union, did you not?

A Yes.

Q Now, at the time you were up in Sacramento were you traveling out of Local 595, was it?

A I beg your pardon?

Q Were you a traveler at the time that you were up in Sacramento from Oakland?

A What particular time are you talking about?

Q December of 1982.

A No.

Q What was your status up there at that time? You were still a 595 member?

A Yes, right—up here?

Q Yes.

A I was Superintendent.

Q Well, no one from 595 dispatched you to Royal, did they?

A No.

Q And, no one from Local 340 dispatched you to Royal?

[49] A No.

Q So, you were up here as an IBEW member and you did not get dispatched from either Local, did you?

A No.

Q You didn't even try to get dispatched, did you?

A Oh, yes, I did.

I was on the books for almost seven months with 340.

Q But, you were not dispatched?

A No, but I was on the books.

Q So, you were aware that you were out there having not been dispatched?

A Yes.

Q And you're aware that that did violate the Constitution?

MR. NOVOTNY: I would object.

I don't see anything in the provisions under which Mr. Schoux was fined that deals with dispatches.

MS. SURE: Mr. Schoux was fined for violating the contract, which includes all sections of the Constitution. He was fined for violating the oath of the Union which includes all sections of the Constitution.

MR. NOVOTNY: Which section of the—

MS. SURE: Article—

JUDGE POLLACK: Please, one at a time.

MS. SURE: Article XII, Sections 3 and 4.

[50] (Pause.)

Oh, I'm sorry. Article XXII, Sections 3 and 4.

JUDGE POLLACK: All right, let's go on.

The objection is overruled.

THE WITNESS: What's the question, again?

BY MS. SURE:

Q You were aware, were you not, that you were out there working for Royal in violation of this contract that you had entered into?

A My understanding that under the supervision I was not in direct violation of the Constitution.

Q You thought that you could just go working anywhere and not get dispatched from a Local?

A True.

Q You didn't show up at the Trial Board, though, to rebut the charges, did you?

A No. I was told not to.

Q You weren't told not to by any Union official of Local 340?

A No.

Q Who told you not to?

A The law firm that's—

Q Of what?

A Thurman? Thierman.

Q Why did he tell you not to show up?

[51] MR. NOVOTNY: Objection.

JUDGE POLLACK: Sustained.

BY MS. SURE:

Q Now, you started working for Royal in mid-November of 1982, correct?

A Approximately, yes.

Q Approximately mid- or late-November?

A Somewhere in that vicinity.

Q You were aware at that time that the IBEW Local 340 had no contract with Royal, weren't you?

A Yes.

Q And, you were aware that no other IBEW Local had a contract with Royal?

A They had no contract at all.

Q Royal had no contract at all?

A No, the IBEW.

Q Did they have any contract with any union to your knowledge?

A Royal?

Q Yes.

A Yes, I believe they belonged to the NAIU.

Q NAIU?

A Independent union.

A Do you know what union it was?

A Do I know what union it is?

[52] Q Yes.

A No, I'm not familiar with it.

Q You've never told that they have a contract with a union?

A They belong to the – I understand they belong to the NAIU.

Q On what –

A I've never seen a copy of the contract, no.

Q On what do you base your knowledge that they have any contract with the NAIU?

A Because they hire out of the hall.

Q What hall?

A The hiring hall.

Q Some NAIU hiring hall?

A I guess.

Q Do you know?

A No, I don't even know where it's at.

Q So, you've never been down there?

A No.

Q And, you've never called there?

A No. I have the number but I have never called.

Q Who would do all of that? Mr. Velluntini?

A Frank? Yes.

Q So, it would go along that you've never adjusted any grievance for any union disputes?

[53] A Oh, no.

Q You've never bargained for any contract with any union?

A No, that's not part of my function.

Q It's not your function at all?

A No.

(Pause.)

Q Now, out on the Aerojet job—and let me direct your attention primarily from the time that you started out there to mid-December, when you were cited.

A Um-hmm.

Q You were cited on December 14, 1982, I think that's in the records.

A Yes.

Q Okay.

Directing your attention to that period of time, is it accurate to say that you never hired anyone or fired anyone during that period of time, did you?

A Yes, I had a crew on the job.

Q Well, you got the crew from where?

A From the shop.

Q And, who had that crew there? The crew was there, were they not?

A No, I was there. At that particular time I was there with the crew, I was running the job, at the time that I was [54] cited.

Q But, the individuals on the crew when you started out there in November, how did—Royal had somehow gotten those individuals, had they not? The Velluntini's had—

A At the time that I was cited I was already employed as a supervisor on the three projects.

Q Okay.

At the time you started in November was there a crew?

A No.

Q And, did the Velluntinis then get the crew from the hiring hall, or do you know how they got the crew?

A I requested the manpower and they would send them out and then I would interview them, and if I didn't like them I would return them.

Q Okay.

But, you had no idea what their work was like when they came out, did you?

A No.

Q So they went to work?

A Under my instructions.

Q When they came out they went to work?

A Yes.

Q And, you don't know how they were hired actually, whether they were hired off the street or through some hiring hall or how?

[55] A No, I don't.

Q Now, from the time that they were hired out there—you know, hired from the Velluntinis—and sent out to this job site that you were out on—

A Um-hmm.

Q —from that time in November until December 14th approximately did you fire anybody?

A No.

Q And, between that time period you obviously never called the hiring hall, because you didn't have their nunber, and you never went out to the hiring hall to get any additional men, did you?

A I had two already.

Q So, there were only two out there at that time?

A Yes, at that time.

Q There were just the three of you from mid-November to mid-December?

A Off and on.

Q Off and on, sometimes less than three?

A No. Off and on on a day to basis, it depended on the job.

Q Well, this is all at the Aerojet?

A Yes.

Q And so, from mid-November to mid-December there was yourself and these two other fellows?

[56] A Yes.

Q What were their names?

A I don't recall right off.

Q No recollection at all?

A No, I deal with so many men.

Q Okay.

So, there was yourself and those two. Do you recall anyone else out there from mid-November to mid-December?

A (Pause.)

You mean as far as crew?

Q Yes.

A No.

Q So, there were the three of you?

A Yes.

Q And was this on all three projects at that time, or just one of them?

A Well, one overlapped the other one.

Q So, the three of you working on the three projects?

A Yes. Well, the large project, the lighting project, I peaked out at seven men.

Q Well, I'm just directing your attention to that period of time right now, from mid-November to mid-December.

A Right.

Q There was no peak-out then, was there?

A I would say probably two to three.

[57] Q So, yourself and these two others—

A Right.

Q —were they then working on the vacuum pump, the substation and the relighting job?

A No, the relighting job was not out to bid then.

Q Okay, so there was just the vacuum pump and the substation jobs?

A Right.

Q The three of you were out there working on those two jobs?

A Yes.

Q Okay.

Now, did you transfer at any time to some other job those other two fellows between mid-November and mid-December?

A Depending on the work scope I would send them back into the shop.

Q Okay, so there were times when it was only yourself and one other fellow?

A Right. And sometimes by myself.

Q Sometimes by yourself?

A Yes.

Q Now, when you were out there by yourself was it the substation job you were working on or was it the—

A At the time I was cited it was the substation job.
[58] Q And, at that time it is correct to say that you were installing a disc connector or mounting a disc connector?

A No, I was checking the secondary buss ties between the primary and the secondary panels.

Q Well, you were taking on and off a panel, were you not?

A Yes, right. Access cover to a panel, right.

Q It's accurate to say, isn't it, that a Journeyman or anybody would have to take off a panel to install wire and that would be a typical—

A Yes, right.

Q And, that's what you were doing at that time?

A Yes.

Q And, at that time you were carrying your tools, you were carrying your tool belt, weren't you?

A No.

All I had was my screwdriver and my sidecutters.

Q Well—

A And possibly a pair of channel locks. I sometimes carry my pouch.

Q Well, your pouch was out there, wasn't it?

A Probably in my truck.

Q You carry your pouch in your truck, don't you?

A Yes.

Q Every day you have your pouch of tools in your truck, don't you?

[59 A Not always, depending on what I have planned for the day. If I have to access to panels and switch gear and stuff like that then I have to, you know, have the necessary tools to have access to them.

Q When there are only just the two of you out there or the three of you out there you would carry your pouch, wouldn't you?

A No, not really.

Q Not necessarily?

A No, mostly the plans.

Q But, the only tools that would be necessary to install a disc connector, or inspect a disc connector, would be—for any Journeyman it would be pliers or—

A Yes, screwdriver, a pair of pliers, side cutters.

(Pause.)

Q Was there any heavy work done at all from mid-November to mid-December?

A Setting the three pieces of the switch gear.

Q That was kind of heavy?

A Yes.

Q Could one man do that himself?

A No.

Q So, would you help out whoever it was out there?

A Just as far as instructing as to how to go about it.

Q Well—

[60] A It was done primarily with a forklift, heavy moving equipment.

Q Well, I mean if there was something heavy—was there any heavy conduit out there or anything to move around?

A Yes. Usually two men handle it with no problem.

Q But, if it was yourself and one other man you would help him, wouldn't you?

A Not necessarily.

Q You would make him do it himself?

A Or I would, you know, request—I usually would try to request somebody else. I usually try to man my jobs, you know, sufficiently.

Q If it was too heavy for him to move what would you do?

A If I need to men I'll call for two men.

Q But, if there was conduit there and it was heavy and he had to move it would you help him move it or would you just go call and get someone there to move it for five minutes of that day?

A I would probably call somebody to help him move it.

Q Did that ever happen?

A Possibly.

Q Did you ever call anybody during that period of time?

A Possibly.

Q But, you don't recall more than two or three people from mid-November to mid-December?

[61] A (Pause.)

Not right off-hand, no. Without, you know, my daily timesheet I wouldn't know whether, you know, there was four there or—

Q Did you bring your daily timesheets?

A No, I didn't.

Q Do you know where they are?

A What's that?

Q Your daily time logs?

A It was quite a while ago.

Q Do you keep them?

A Usually.

Q What do you do with them?

A Just throw them somewhere.

Q You just throw them somewhere?

A Yes.

Q Nobody looks at them?

A Oh, no. They're just mine, my personal notes on the job.

Q So, you're not told to take any time logs for anybody?

A I do now, yes.

Q But not then?

A No.

I kept the daily timesheet, which the office has those. And as far as any personal problems or anything like that I [62] just logged it down for my own knowledge, to refresh my memory.

Q Okay.

(Pause.)

Now, when you first went out there to the job you were not pulled aside by Mr. Velluntini and specifically told, I mean, you weren't specifically told, "Albert, you may hire, you may fire, you may authorize overtime", you were just told, "This is the job, there's two other guys out there", weren't you?

A No.

Q What did he tell you?

A We met at the office.

Q How long did you meet?

A Oh, a couple of hours in his office.

Q And, this was the first time you were hired?

A Yes.

Q You never worked there before?

A No.

Q And, did he give you any written statement of your job duties?

A No.

Q So how do you—

A I don't have a contract with him, if that's what you're referring to.

[63] Q No.

Did you just assume what your duties would be, then, generally?

A No, I know what my duties were—

Q I know—

A —they stated.

Q Who stated what?

A They stated that I would be in complete control of the supervision, the manpower and the material.

Q And, that's basically what they stated?

A That's right.

Q Who is "they"?

A Leo and Frank Velluntini.

Q Now, when you worked on again and off again, as you stated you have, how does that work? Do you just decide when you are off or on, or do they?

A If I was on, um-hmm.

Q What happens when you're off out at the Aerojet job?

A I'm usually home working on my house. I'm in the process of building my own home.

Q And the work continues?

A If I'm not there then there's no crew there.

Q The work—

A If the job warrants four hours a day then I'm there four hours either by myself or with the crew, and that's [64] primarily what they pay for.

Q Now, for this particular job you stated that the plans and specs were complete, they were fairly complete and straightforward, were they not?

A Yes. Well, specs are specs. It's just, you know, stipulations that they want you to use certain types of materials.

Q So, there was—so, it would be accurate to state, then, that the specifications would show exactly where the lighting panels would go and show exactly where all of the fixtures would go and those kinds of things?

A No, all the specs do is call out how the job shall be done and what type of materials will be used on it. Now, on the plans it shows the locations of these items. But, in most cases when they've drawn their drawings you're going into an existing building so you don't know where the old stuff goes.

So, therefore you have to open the panels and inspect all the old stuff in order to relocate it.

Q Is this pretty routine as to how an Electrician—

A Yes. Especially on this particular one, it was sort of like a remodel, you know. On a new construction job it would be, you know, pretty well cut and dry.

Q So, in your experience as an Electrician this would be a more routine remodel job as opposed to a more complicated [65] new construction—

A Yes, I would say so.

(Pause.)

Q Now, as any owners is it accurate to say that the Vellunitinis would have the ultimate veto power, would they not, over anything that goes on on that job if for some reason they wanted to?

A Yes, they could write me my check.

Q And, they could make any other decisions out there, certainly?

A Of, sure. No doubt, being the owners of the company.

Q And, do they generally like to know what's going on out there?

A That particular job it was pretty much involved and they, you know, pretty well let me run it the way I see fit.

Q Was that because it was a routine job?

A No, they do that with just about all of them.

Q But, they didn't anticipate any problems on that job?

A No, it was a fairly simple job. It was just a matter of taking down fixtures and putting new ones up or something, rewiring.

Q There were no safety complaints between—

A No.

Q No.

A Just the only problem I had, I'd say, was the hardhats. [66] They had a Safety Engineer who would go through the building probably a couple of times a week and he'd spot one of my guys without his hat on and he'd come over and say—in fact, he even caught me a few times.

Q You mean he told you to put on your hardhat?

A Yes.

Q Well, on a job that's so cut and dry and routine how much time—you don't need to spend a lot of time with plans and specs, do you?

A Well, plans I do. Because, like I say, I'm usually trying to stay ahead of the crew all the time. Before they get to a particular situation where they have to tear out fixtures I have to go back and relate to the drawings as to what has to be removed and relocated and make sure the power is turned off of all these units, so they don't get electrical shocks.

Q You'd be out there on the job walking around a lot?

A Right.

Q There wouldn't be any need to sit in the office for eight hours looking at the plans and specs, you would have them out on the job?

A Well, at that particular point in time I had a golf cart.

Q You had a golf cart?

A Yes.

[67] A seven and a half acre building is pretty large.

Q But, then when you got to the actual site you would be walking around with your screwdriver and opening up panels and undoing panels?

A Yes.

Undoing panels, making sure that all the circuits are shut off.

Q Now, undoing a panel and making sure a circuit is turned off, it's your experience as a Journeyman that would be something that all Journeymen should do before they, for instance, start reconnecting lighting or connecting wires? They would go in and make sure a panel is turned off, wouldn't they?

A Yes.

Q So, if any Journeyman is assigned to, for instance, rewire an existing panel he would go and take the panel off and make sure it was turned off, wouldn't he, or she?

A Not necessarily.

Q You would hope that he or she would do that?

A No, I usually do that all myself on all my jobs.

Q But, if a—you know, as a Journeyman for twenty-four years would you not make sure—

A If I was working alone, sure.

Q And, you would assume that most Journeymen would make sure—open up the panel and make sure it was turned off [68] before he put in a wire?

A Right.

Q This drinking incident where you told the individual?

A Yes.

Q Was this one of these two fellows that was with you that first month?

A No.

This was later on the lighting project.

Q When did that lighting project start?

A Roughly, I think it ran between November through February, about the 20th of February. That was the final. We had April 15th and we finished thirty days—

Q But, this happened sometime after that first month? What, it happened sometime in January?

A Yes, probably sometime in January.

Q And, this fellow who was scared of heights, was that one of those first two fellows?

A No, that was one of the lighting crew.

Q So, again, in January sometime?

A Right.

Q Now, when did Jack McAtee ask for this promotion?

A He didn't ask for it.

Q Well, was that—

A The problem arose through the office, that they were starting another job and I hadn't completed out

there. And, [69] they asked me if I thought there was a qualified Journeyman on the job that could handle it. And, I suggested McAtee.

Q When was this, recently?

A Yes, this was to completion probably in February. He's one of the few I kept.

Q And, Stan? When was that, also recently?

A That was probably in December.

Q Late December?

A Somewhere in there.

Q And, you at no time authorized overtime, you were asked that?

A Yes.

(Pause.)

I can.

Q But, you never did it?

A No. No reason to.

(Pause.)

Q So, would it be accurate to say, then, that you used your tools up to about ten percent of the time, maybe less?

A Probably less.

Q But, up to about that?

A Well, between using the tools and instructing the crew with the tools of the trade I would say probably somewhere in that vicinity.

Q And, when there were less people on the job that [70] percentage may be higher, and when there are more people on the job that percentage may be lower, is that accurate?

A No, not really. It's pretty much about the same.

Q But, there's less to instruct, there's less to show when there's only two people on the job, isn't that true?

A It depends on the individual. Sometimes I don't have to show them anything, some are more qualified.

But, if I put them somewhere doing something that they're not qualified in then I'll have to instruct them in how to do it.

Q But, there would be obviously less to go over—

A You could probably say a percentage, sure.

Q It would be—

A It would be obvious.

Q It would be higher when—you would be more likely to—

A Ten percent, I would say—yes, if I peaked out at ten, seven to ten guys.

Q I'm not quite sure I understand that.

A I beg your pardon?

Q I's not quite sure I understand your answer.

A Well, with a larger crew I would have more instruction time, is what I'm saying, than I would with a nominal crew of just two.

Q But, if there were less people out there there would also be less to—

[71] A Instruct.

Q Well, and less to supervise, so to speak?

A Yes.

(Pause.)

MS. SURE: I have no further questions.

JUDGE POLLACK: Any redirect?

MS. WATSON: Yes.

REDIRECT EXAMINATION

BY MS. WATSON:

Q Did you have the authority to call the hall, the NAIU nall, for any employees?

A Yes, if necessary.

Q Why did you never call them?

A There was really no need to.

Q Why was there no need?

A I would usually contact the office and get the necessary help I needed.

Q And the necessary help would be people that were already on the payroll?

A Yes.

Q When you started the Aerojet job and there was no crew who was it that determined the number of people that were needed for that job?

A I did.

Q And, who was it that determined the qualifications [72] that the people needed?

A I did.

Q When you were out on that Aerojet job by yourself what were you basically doing?

A Researching the job.

Q What did that entail?

A Like I told her, running down circuiting, trying to coordinate things with Aerojet as far as material flow to us—you know, they were the primary supplier of all the material—and make sure everything fell together.

Q Were you actually installing any electrical panels or conduit or anything while you were out there by yourself?

A No.

Q When you were out there with just one or two other people were you actually installing any electrical conduit?

A No.

Q When you were, on December the 14th, inspecting those buss ties using your tools—

A Yes?

Q —were you actually installing anything into that panel?

A No, all I did was—I believe I had a screwdriver and a pair of sidecutters and I was on top of a six-foot ladder. Primarily what I was doing was checking the alignment on the busses for the ties, that was my purpose.

[73] Q What was the purpose for inspecting all of these panels and making sure that the electricity was cut off instead of having the Journeyman Electrician do that?

A Usually I prefer doing it myself because I could be held responsible for injury to a party. And I'm more familiar with the job, and that's basically my job as Job Supervisor.

Q Now, you had worked for Royal before you worked at the Aerojet project, right?

A Yes.

Q Did Royal call you and offer you the Aerojet job or did you call in and say, "I want to come back to work", or how was this arranged?

A They called me.

Q And, what did they say to you?

A They asked me if I would be interested in going out to Aerojet and running a small job for them.

Q Now, when they—had they offered you jobs like this before?

A Yes.

Q Had they ever called you and offered you a job—

MS. SURE: Objection; irrelevant.

We have no time frame on any of this.

JUDGE POLLACK: Well, let's wait until she finishes the question, for one thing.

[74] BY MS. WATSON:

Q Had they ever called you and offered you job as a Journeyman?

A Yes.

Q When you work on and off for Royal are you working on a per-job basis until you complete a job?

A No, it's usually—what do you mean? I don't quite understand the question.

(Pause.)

Do you mean am I going to stay until the finish of the job?

Q That's correct.

A Yes.

Q You don't just pick up and leave and work on your house in the middle of the job, is that correct?

A Well, if the job reaches a point where it doesn't require any manpower then I will pull off.

Q But, do you normally stay until the job is completed?

A Yes.

Q Now, this building at Aerojet, you said it was seven and a half acres?

A Yes.

Q How big—how many plans were there?

A There was a total of six.

Q Large blueprints, or how big in size?

[75] A It was cordoned, broke up in sections.

Q Can you describe that for us a little bit better?

A Well, on that large of a building when they scale it out they can't possibly put it on one sheet. So what they'll do is they'll break it up in like a quarterly section, or on highrises or, you know, on large buildings they will do it by floor level.

But, in this particular building, being it was one level, they did it in different sheets. They put a portion of it on each drawing.

Q And, besides those plans you also dealt with the specifications, right?

A Yes.

Q How big was a packet of specifications?

A Oh, probably about that big.

JUDGE POLLACK: Well, what's that, is that an inch and a half?

THE WITNESS: Okay, an inch and a half, yes.

BY MS. WATSON:

Q During November and December when you were out there on Aerojet when you used your tools what did you use them for?

A Mostly inspection purposes.

Q Have you run more than one job at a time for Aerojet.

MS. SURE: Objection. No time frame.

[76] MS. WATSON: At any time.

MS. SURE: Well, objection, then.

JUDGE POLLACK: Let's find out the answer first and then if the answer is yes we'll find out what time frame.

THE WITNESS: What was the question?

BY MS. WATSON:

Q Have you run more than one job at a time?

A At Aerojet? Yes.

Q At any place other than Aerojet for Royal?

A No.

MS. WATSON: No further questions.

REDIRECT EXAMINATION (cont.)

BY MR. NOVOTNY:

Q Have the Velluntinis ever informed you of your authority to adjust grievances with Union representatives on the job sites?

A No.

Q They have not informed you?

A That doesn't involve me.

Q Given your experience at various jobs you worked for Royal, including Aerojet, do you believe you have the authority to adjust –

MS. SURE: Objection.

MR. NOVOTNY: – grievances with Union representatives?

MS. SURE: Objection. That's leading.

[77] JUDGE POLLACK: Sustained.

He's just testified he hasn't discussed it with them.

MR. NOVOTNY: Well, on the basis of his experience, though.

BY MR. NOVOTNY:

Q Would it be something that you would do without checking—

MS. SURE: Objection.

JUDGE POLLACK: Sustained.

BY MR. NOVOTNY:

Q Do you have the authority to adjust personnel disputes on the jobs you work on?

A Yes.

Q Do you have the authority to adjust problems over working conditions?

A Yes.

Q Does anybody from Local 340, any officers or representatives, to your knowledge asked you about your job status with Royal since November of 82?

A No.

* * *

[83] **RECROSS EXAMINATION**

BY MR. NOVOTNY:

Q Mr. Schoux, when you first came out to Royal did you have any discussions with them about the fact that you were an IBEW member?

A No.

Q None at all?

A No.

Q Did they know that?

A No.

Q So, did they ever tell you anything with respect to whether or not you'd be subject to Union discipline for working out there?

A No.

Q And, when is the first time they told you that maybe you could get out of the Union discipline, or that—

MR. NOVOTNY: Objection.

JUDGE POLLACK: Let her finish the question.

BY MS. SURE:

Q Or that they could assist you in getting out of the Union discipline.

MR. NOVOTNY: Objection.

There's no foundation that they ever did tell him that.

JUDGE POLLACK: I'll overrule the objection.

[84] BY MS. SURE:

Q When is the first time that they told you that they could assist or that they could get you out of Union discipline somehow?

A Right after I received the citation.

Q And, they told you at that time that maybe you could get out of it because if you claimed that you were a supervisor that the Union couldn't do anything with you?

A No, they didn't say that. They just said that there were a lot of legal actions that we could take. You know, they gave me a course to take other than the Union, so I decided on it.

Q Well, they said that there were legal actions that you could take, and then they wrote this letter for you?

A Yes. They told me I could fight it with the NLRB.

Q And, did they tell you on what basis they thought you could get out of the Union fine.

A No. They had no way of knowing that.

Q Well, they wrote this letter for you, though?

A Yes.

Q And they told you that this letter would do it?

A No.

Q They told you that filing the charge would do it?

A No, they just said that this was my avenue of defending myself.

[85] Q And you said fine and then you signed it?

MR. NOVOTNY: I'll object.

This is irrelevant.

JUDGE POLLACK: Overruled.

BY MS. SURE:

Q So obviously you said fine and then you signed it, if that's an avenue that can get you out of Union discipline, is that correct?

A Well, my understanding at the time was that, you know, this wasn't going to eliminate the fine or any other problem, this was just my avenue of defending myself, my status at the job.

Q And, they told you it was your avenue and that's why you took it?

A Well, they suggested, if I wanted to do it. You know, there's court costs and there's lawyer's costs and, you know, there are other things to be determined.

Q But, there would pay for that, wouldn't they?

A No. Oh, no.

(Pause.)

Q Now, when Ms. Watson first asked you about when you started the job in November you stated that the office interviewed prospective people to come out there, correct?

A Yes.

Q So, they determined initially the qualifications, they [86] interviewed.

A Usually what they discussed primarily is the wages and the type of work that's going to be done. And as far as what I determine is whether they'd get the job, whether they were qualified as far as I am concerned, whether they can do the job or not.

Q But, they made some kind of initial qualifications screening?

A Yes, they usually take care of the paperwork, as far as the W-2's and, you know, the benefits and things like that.

Q In terms of the wages, do you have any idea what scale they are paid?

A It varies. I believe they have four or five different classes.

Q And, who sets all that, the office?

A Yes.

The office and, I think also the hiring hall.

Q When you say that you make more than that, is that more than – more than which classification, do you know?

A Fifty percent more than a Journeyman, which is at fourteen-thiry-five ($14.35).

Q So you make fifteen percent more than –

A Fifty.

Q Fifty percent more than $14.35.

A Yes, I'm presently at twenty-one dollars an hour.

[87] Q Is that a package?

A Just an hourly rate.

Q Do you get fringe benefits at all?

A No.

Q Do you know what the present Journeyman's scale is for the Journeymen out there?

A I believe it's somewhere at fourteen.

Q About fourteen?

A Yes. Fourteen without fringes. I'm talking about the actual base pay.

Q But, you don't have any firm recollection because you've never seen their contract?

A No.

(Pause.)

I don't deal in payroll, all I do is turn in their time and pick up their checks and disburse the checks to the men.

Q Now, on a remodel job is there any new installation to be done?

A Oh, yes.

Q There is?

A Yes, usually you have to tear out a portion of existing stuff and a lot of times you can take advantage of existing conduits, pull out the old wire, pull in new wire. And you have to extend it, you know, or relocate it.

[88] Q You said you were checking alignment of buss or ties?

A Yes, buss ties, right.

Q Buss ties?

A Yes.

Q Okay.

What is that?

A Okay, at this particular substation I was working on had three primary units. They had a high voltage section and it has a transformer, because there is twelve-thousand coming in—a large transformer—and then it had a secondary section, which was a distribution for the new equipment in the building.

And, these three units come separately shipped on account of their weight. The whole thing was fifteen feet long and six feet wide.

Q That kind of work would be typical work of a Journeyman, to check alignment of these things on buss ties, is that what it means?

A It could be, yes.

But, rather than pull a Journeyman off a Journeyman's job from being productive why not just do it myself?

MS. SURE: Yes, okay.

No further questions.

* * *

[85] LEO F. VELLUNTINI

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE POLLACK: Please give us your name and address and spell your last name.

THE WITNESS: Leo F. Velluntini, V-E-L-L-U-N-T-I-N-I. I reside at 2429 39th Avenue, Sacramento, California.

DIRECT EXAMINATION

BY MS. WATSON:

Q You are with Royal Electric?

[90] A Yes, I am.

Q What is your position with Royal?

A I am one of the owners.

Q Did you hire—

MR. WATSON: Excuse me, can we go off the record for a monent?

JUDGE POLLACK: Off the record.

(Discussion off the record.)

On the record.

BY MS. WATSON:

Q and, the other owner is?

A Frank Velluntini.

Q Did you hire Mr. Albert Schoux?

A A combination of Frank and I, we did it together, yes.

Q And, when did you first hire him?

A We first hired him—I can't give exact dates—somewhere in October or November of 1982.

Q Had he worked for you prior to that?

A No.

Q And, did you discuss with him when he was hired what his job duties and his authority would be?

A Yes, we did.

Q What did you tell him?

A That he had complete control of the jobs that he would be handling when he was working for us. At that time we [91] discussed his job duties, that he would run anywhere from one large job to many jobs if necessary.

Q Do you have any other Foremen who work for Royal Electric?

A We have some other Foremen, yes.

Q How does their authority compare to Mr. Schoux's?

A None whatsoever. They report to Mr. Schoux.

Q Would they be able to request extra employees directly from the office?

A They would call the office, they would definitely not call the hall. They would call and discuss with us or with Al Schoux whether or not there were more people needed for that particular job.

Q Does Mr. Schoux have the authority to call the hall if necessary?

A Yes, he does.

Q And, in what kinds of situations would he have the authority to do so?

A At any time that he decided that he needed additional help and if he was aware of the fact that we didn't have additional employees in our shop, in our pool of men, that we could send to the job. We try to keep our crews as permanent as possible and working for us steadily, so we do try to move people from job to job.

If these men are not available he would call the hall [92] to hire people.

Q And, none of your other Foremen have that authority, is that right?

A No, they do not.

Q Do any of your other Foremen have the authority to fire someone on the job?

A We prefer that they don't. We will back their word after we've discussed it with them. If something serious has happened and the man says, "You're fired", we'll hear it and then either agree or disagree. If it's a serious offense, yes, they do have the authority. But otherwise, no, they would not have that authority.

Q Now, when Mr. Schoux was hired did you discuss the amount of work that he would be doing with the tools?

A No, not really.

We discussed the fact that he would be our supervisor on the jobs and that he would be on the jobs, because of the particular size and nature of the jobs, that required a full-time person with the intelligence to do the job properly.

The job actually was a little more intricate than Al had said that it was and it took a lot of coordination between our company, our subcontractors on the job—the high voltage contractors, the draying company that we had subcontracted to to set the switch gear, and in another case the backhoe operators and people who come out and work for [93] us during that process of the job.

Somebody had to be there to be sure that that job was done properly, it wasn't one that could be left to run by itself.

Q And that person who was responsible for coordinating all these things was Mr. Schoux?

A Yes, it was.

MS. WATSON: I have no further questions.

DIRECT EXAMINATION (cont.)

BY MR. NOVOTNY:

Q Did you discuss Mr. Schoux's authority to adjust grievances on the job when you hired him?

A I believe my word to Al when we first hired him was: "The job is your problem. We're hiring you because we know that you can handle it, we feel that you have the capabilities of doing it. You handle it and we don't want to hear about it. Unless it's something that's really serious, you can adjust anything you have to out on the job. You can call for a check, send a guy home, you can do anything

you want on that job. You also coordinate with inspectors, engineers, and any of the Aerojet personnel." Which he did.

Q Did you tell him anything else regarding his grievance adjustment authority for Royal Electric at that time or any time since you hired him?

A Would you say that again, please?

[94] Q Did you tell him anything else regarding his authority to adjust grievances between employees at that time or at any other time since he's been employed?

A I didn't have any other conversation with him, no.

MR. NOVOTNY: Nothing further.

MS. SURE: Has Mr. Vellunitini given any statements?

MS. WATSON: Yes.

(Hands to Ms. Sure.)

MS. SURE: Could I have one moment?

JUDGE POLLACK: All right, off the record.

(Off the record.)

Back on the record.

CROSS EXAMINATON

BY MS. SURE:

Q Mr. Velluntini, how long have you been one of the owners of Royal?

A Since its establishment. 1971, I believe it was that Royal was established.

Q And, from 1971 to September of 1981 was your company under contract with a contract with the IBEW 340?

A I believe that that contract had expired prior to September of 1981.

Q So you had no contract as of what time?

A As far as I would assume—I don't know exactly, I think we're still discussing all of this, but—

[95] Q June, do you think it was June?

A See, the contract ran out May 31st and as far as I was concerned then we had no contract after that.

Q And as far as you're concerned now there is no contract with the IBEW?

A That's right.

Q And, are you under contract with any other labor organization?

A Yes, I am.

Q What organization is that?

A I'm a member of NECA and we're signed with the National Association of Independent Unions.

Q Since what date have you been signed with them?

A With the NAIU?

Q Yes.

A From the first day that NECA signed with them.

Q Do you happen—have you ever seen a copy of that contract?

A Yes, I have.

Q So, since October of 1981 have your men been covered under that contract?

A Yes, they have.

* * *

[99] BY MS. SURE:

Q To the best of your knowledge after May 31, 1981 you have had no contractual agreements with the IBEW 340?

A No.

Q In fact, were your employees represented by the IBEW 340, do you know?

A At this time, today?

Q At this time.

A No, they are not.

[100] Q And, in December of 1982 were they?

A No.

Q Since September of 1981 did any Union official ever—well, strike that.

Isn't it true to say that since September of 1981 no IBEW Local 340 official ever told you that they felt that you were under contract with the IBEW 340?

A No.

Q No one ever indicated to you—any official from the IBEW 340—that they desired to have a contract with you?

A No.

Q Nor did any Union official ever indicate to you any desire to represent your employees?

A No.

Q And, you have felt no bargaining obligation to the IBEW 340 since September of—

A I have not.

Q That's a no? Since mid-81?

A Would you say again? I may have misunderstood you, I'm sorry.

Q I just want to make sure my question was out before you said no.

You have had no bargaining obligation with the IBEW Local 340 since mid-1981?

[101] A No, I have not.

Q And, it would be therefore impossible for anyone employed by you to settle any grievances with IBEW 340 since mid-1981?

A No.

Q Nor would it be possible for any employee of your's or yourself to negotiate a contract right now with IBEW 340? You wouldn't direct any employee, would you, to go and negotiate a contract with IBEW 340?

A No, I would not.

Q And, that includes Mr. Schoux?

A Mr. Schoux can do whatever he wants. I couldn't—

Q But, can he do it on behalf of Royal Electric?

A No, I don't suppose that he could.

Q Well, could he or couldn't he? Could he go out and sign a contract for Royal Electric with IBEW 340?

A No.

(Pause.)

Q Could anyone other than yourself or—is Frank your brother?

A My son.

Q Your son.

Could anyone other than yourself or your son negotiate with a labor organization on behalf of Royal Electric?

[102] A Could you repeat that again, please?

Q Could anyone other than your son or yourself be in the position of negotiating?

A Yes, I am signatory to the NECA agreement and they could—

Q That's not my question.

A Sorry.

Q Could anyone other than yourself or your son go out on behalf of Royal Electric and negotiate a contract with a labor organization? Would anyone else have that kind of authority for Royal Electric?

A (Pause.)

Again, I'll have to say yes.

Q Who?

A The association that I belong to.

Q Okay, would Albert Schoux have that kind of authority?

A That was never discussed. I would say no, he does not have that authority.

Q So, whatever the IBEW—whatever contractual agreements the IBEW has with other employers, that would have no effect on your business now and it wouldn't have since mid-1981?

A That's true.

Q Now, you stated that Mr. Schoux would have the authority to call the hall and get men. But, you never gave him the telephone number of the hall, did you?

[103] A He has the number.

Q Did you hand it to him?

A I didn't hand it to him, no.

Q How do you know he has it?

A I would have to assume that he has it, or has the intelligence to call and find out where it is and to call them.

Q But, you've never told him where it is. Would you be surprised—

A It wasn't actually—

JUDGE POLLACK: Wait. Again, one at a time.

BY MS. SURE:

Q You've never told him the number for any place to get men, have you?

A I did not. I don't even know the number.

Q You don't know the number?

A No. I would have to look it up.

Q Who may know the number?

A Anyone with access to a telephone book.

Q Well, who in your office?

MR. NOVOTNY: Objection.

JUDGE POLLACK: He said he would have to look it up. What do you want to ask him now?

BY MS. SURE:

Q Have you ever called any hiring hall for men?

[104] A Yes.

Q And, where have you called, do you know?

A Yes. I have called the NAIU hiring hall, which is in the NECA Building here in Sacramento.

Q But, you don't recall ever giving Mr. Schoux that number?

A I personally did not give him that number.

Q Are the men out working for Royal Electric, are they all hired out of the hiring hall that you're talking about or are they hired other ways?

A They are not almost entirely hired through that hiring hall. For a period of time there weren't any men available and we had to hire our own people and then refer them back and they signed and became a member of that union. So, for a period of time we were hiring people by taking applications, screening them, reviewing them, and if we wanted them then we would send them in to clear out through the hall. And that would be the—

Q What period of time was that?

A (Pause.)

Oh, the first six months or so—maybe a little longer—of the establishment of that hiring hall. Because it was so new.

Q Are you talking about 1981?

A Yes.

[105] Q Okay.

Directing your attention to November and December of 82 on the Aerojet job?

A Yes.

Q Now, at that time that was the only job Mr. Schoux was assigned to, was it not?

A At that time it was, yes.

Q And, at that time there were no other Foremen that were responsible to him, were there?

A To him?

Q Yes.

A No.

MS. SURE: No further questions.

REDIRECT EXAMINATION

BY MS. WATSON:

Q Mr. Velluntini, is Royal Electric a member of the NECA, Sacramento Valley Chapter?

A Yes, we are.

Q How long have you been a member?

A We joined, I believe—I'm not absolutely certain. It could be July, August or September of 1981.

Q Of 1981?

A Yes.

Q And, after September of 1981 did you sign any new document making the NECA your bargaining agent for a new [106] contract?

A Yes.

Q Do you recall what document that was?

A It was—no, I don't recall what document.

Q Do you consider NECA to be your bargaining agent?

A Yes, I do.

Q How long have they bargained contracts on your behalf?

A They bargained on my behalf for several years. I dropped out of the organization in the early 70's—72 to 74, somewhere in that area—because it wasn't financially practical for me to belong at that particular time. I was then a member of NECA and they did represent me.

Q When did they begin to represent you again as your bargaining agent for the contract?

A Prior to the termination of our contract when they went into the negotiations and it was posted as who was members of Letter of Assent A. Our company name, Royal Electric, was listed as such and we thought about it and checked and were told, "Well, you've got the A and you've got it." You know, "We will represent you."

It was listed and there was never any objection to that by anyone.

JUDGE POLLACK: Are you talking about, now, May and June of 81?

THE WITNESS: Yes.

[107] JUDGE POLLACK: All right.

THE WITNESS: Or even prior to that when negotiations were first opened. And I don't remember when that was, six months prior to the contract expiration, or so.

BY MS. WATSON:

Q And, who did you check this out with?

A We called the NECA office.

Q Did you speak to Mr. Paulsen?

A Yes, I believe so.

MS. WATSON: No further questions.

JUDGE POLLACK: Mr. Novotny?

REDIRECT EXAMINATION (cont.)

BY MR. NOVOTNY:

Q You say you signed a Letter of Assent A sometime prior to your signature of these Letters of Assent B?

A Yes, I did.

Q And, by you signing that Letter of Assent A did you understand that you conferred any authority on NECA?

A Yes, I realized that they would negotiate on my behalf.

Q Okay.

And was that authority to negotiate on your behalf to end with the anniversary date of that agreement or to continue from year to year, to your understanding?

A I wasn't aware of what it really amounted to, whether [108] it was to continue or not. I did not read it that closely.

(Pause.)

MR. NOVOTNY: Nothing further.

MS. SURE: I have a few further questions.

RECROSS EXAMINATION

BY MS. SURE:

Q Now, you recall dropping out of NECA in the early 70's, 72 or 74, and at that—correct?

A Yes.

Q And at that time you recall signing a agreement with the IBEW, don't you? You were still signed to an agreement with the IBEW, correct?

A I was still signed to the agreement that NECA had signed with them, yes.

Q Well, you recall signing an agreement with the IBEW, do you not?

A Are you referring to the Letter of Assent here?

Q It's marked as Respondent's 1.

A Yes, I do recall signing that.

Q Okay.

Now, to your knowledge, during that period of time—up until 1981—is it accurate to say that you felt you were not a member of NECA, you had dropped out of NECA?

A I had dropped out of NECA, yes.

[109] Q And, it was not until sometime in, you said, July, August or September of 1981 that you had inquired about becoming a member of NECA again, is that accurate?

A Yes.

Q And, at that time that you inquired to see if you could become a member of NECA again did you notify the Union about it at all?

A I can't say that I did. You know, I don't recall notifying them. I had no correspondence with the Union whatsoever, never even on negotiations. Nobody ever contacted me.

Q So, to your knowledge the Union, then, would have in its possession the document that I have shown you which is marked as Respondent's 1?

A I guess, yes. It probably did have it.

MS. SURE: No further questions.

MS. WATSON: Just one.

REDIRECT EXAMINATION

BY MS. WATSON:

Q You did not become a member of NECA until July or August of 1981?

A Yes.

Q But, you said you did—your name was on a list listing you as an Assent A signer—

A Yes.

Q —as of prior to the negotiations in the spring of [110] 1981?

A Yes.

Q And, you checked this out and found that this was accurate?

A Yes.

Things were very hectic at that time and I really can't say who I talked to or what. It just did happen, they said, "Yes, you are signatory to it", Everybody had at least assumed that because—

MS. SURE: Objection as to what everybody assumes.

JUDGE POLLACK: All right, sustained.

(Pause.)

BY MS. WATSON:

Q But, you did see your name on a list as being an Assent A signer?

A Yes, I did.

MS. WATSON: No further questions.

MR. NOVOTNY: No questions.

JUDGE POLLACK: I have one.

EXAMINATION

BY JUDGE POLLACK:

Q When the Union struck certain employers in June of 81 was there a strike against your company in well?

A Yes, there was.

JUDGE POLLACK: Anything further of the witness?
[111] MS. WATSON: Yes.

REDIRECT EXAMINATION

BY MS. WATSON:

Q Did anyone from Local 340 ever approach you about signing an interim agreement during the strike?

MS. SURE: Objection.

Beyond the scope of my questioning.

JUDGE POLLACK: No, but mine may have provoked it, go ahead.

MS. WATSON: That's correct.

THE WITNESS: I'm sorry, can I answer this?

JUDGE POLLACK: Yes, you may answer.

THE WITNESS: Would you repeat it?

BY MS. WATSON:

Q Did anyone from Local 340 ever approach you during the strike about signing an interim agreement?

A Yes, one of my employees came in with the interim agreement from the Union hall and asked me to sign it.

Q But, no one actually from the Union approached you?

A No official ever contacted me at all.

* * *

[134] NORMAN NUTTER

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE POLLACK: Please give us your name and address for the record.

THE WITNESS: My name is Norman Nutter, I live at 1890 Ridgeview Drive in Roseville.

DIRECT EXAMINATION

BY MS. WATSON:

Q Mr. Nutter, what is your position with Harold E. Nutter, Inc.?

A I am the President.

Q What are your – what is your actual job authority as President?

A I have primary responsibility, short of the Board of [135] Directors and stockholders.

Q Do the day-to-day labor relations and operations of Nutter, are you responsible for that?

A Yes, I am.

Q Are you responsible for hiring Foremen, Superintendents and other employees?

A I do get involved in that, yes.

Q How long have you been in this position?

A As President for approximately one year.

Q And, what was your position before that?

A Vice-President.

Q How did you duties differ when you were Vice-President from now when you're President?

A They were substantially the same.

Q So, you still had the responsibility for hiring and directing the operations of Nutter Electric when you were Vice-President?

A Yes, I did.

Q And, how long were you in that position as Vice-President?

A I don't recall exactly. Three or perhaps four years.

Q Were you working for Nutter before you became Vice-President?

A Yes, I was.

Q In what capacity?

[136] A I was employed as an Estimator/Project Manager.

Q And, how long were you employed in that position?

A I came to work in that capacity in 1975, I believe.

Q Do you know—strike that.

Who is responsible for setting out the requirements and job duties and authority of Foremen?

A I am.

Q And, you have been doing this for how long?

A Since—well, basically I continued the existing policy of the firm when I arrived. It was my responsibility alter or describe that policy at the time that I became Vice-President.

Q Do you have any written job requirements for Foremen?

A Yes, we do.

Q How long have you had these?

A With the inception of the NAIU crew there was some confusion where previously there had been none. It became necessary to compose a document approximately at the end of 1981 or early part of 82.

Q I'll show you a document on the stationary of Harold E. Nutter, Inc., which is labeled "Requirements of Foremen", and I've marked it as GC 11.

(The document referred to was marked for identification as General Counsel's Exhibit No. 11)

[137] Do you recognize that document?

A Yes, I do.

Q Did you prepare that document?

A Yes, I did.

Q Approximately when did you prepare this?

A The document that I referred to was prepared either at the end of 81 or at the beginning of 82.

Q Did you distribute it to all of your Foremen at that time?

A Yes, we did.

Q How many Foremen did you have at that time?

A I don't remember for sure. Approximately ten to fifteen.

Q As new Foremen were hired, or as people were made Foremen later on, did you distribute this to them as they became Foremen?

A Yes, we did.

Q Do you still distribute this to your Foremen?

A At the present time, no. The current members of our work force have become accustomed to it and it's ceased to be a valuable document in everyday distribution. We refer to it only on occasion.

Q And, how long has that been since you've quit distributing it?

A Oh, probably about the beginning of the fourth quarter [138] of 82.

Q Do you know Mel Miller?

A Yes, I do.

Q Do you know how long he's worked for Nutter Electric?

A Yes, I do.

Q How long has that been?

A It's been approximately eight or nine years.

Q And, in what capacity has Mr. Miller worked for Nutter?

A He was employed initially as, and has always remained, a Foreman.

Q Has he ever worked in any other capacity?

A No, he hasn't.

Q Before the strike in 1981 what kind of work was Mr. Miller doing?

A Mel was running a project for us in Redding. It consisted of a Holiday Market – I believe was the name of the market – and a series of shops and some off-site work. A major project.

Q How many employees were on the project, if you know?

A I believe we topped out at twenty or slightly above that.

Q Were there any other Foremen on the project besides Mr. Miller?

A Yes. He had, I believe, one or possibly two Subforemen.

[139] Q Did he have authority over them?

A Yes, he did.

Q And, did Mr. Miller work during the strike?

A He worked for approximately two weeks after the onset of the strike on that project.

Q In Redding?

A Yes.

That project was being handled out of Local 442 in Redding.

Q Now, did there come a time when Mr. Miller came back to work for Nutter?

A Yes.

Q Do you recall when that was?

A I think it was January the 25th, 1982.

Q And, how did he express his desire to come back to work, did he call you or did you call him, or what?

A I believe he called us. He had a chance meeting with Harold in a bank, they chitchatted as old friends. Mel had worked for Harold previously at another employer and they had known each other for twenty years.

Q Now, when you're talking about Harold who are you referring to?

A That would be Harold E. Nutter.

Q Who was the President of the company?

[140] A At that time he was President, yes. And they basically chitchatted and Mel subsequently called the office and he and I talked. He indicated that he was willing to come back to work at that time.

Q Did he say in what capacity he wanted to come back to work?

A He did. He approached me with the understanding that it would be as Foreman, but I forget the exact

dialogue. But, there was a question stated—either a rhetorical statement a question—you know, "Is this going to be like it was before, has anything changed?"

And, I assured him that, no, we had the same respect for his abilities that we always had, that there were no hard feelings of the strike, and that, yes, everything was as it had always been.

Q Did you discuss in any detail what his job duties would be?

A No.

After, say, roughly nine years of employment with us and a previous similar working condition for Harold at as an Estimator at George Foss there was no need for that discussion. It was well-known.

Q Were any differences in duties discussed?

A Only the discussion of concern, "Would there be any difference?" and the answer was no, everything was the same. [141] Except that we needed him more.

Q Did you discuss what his rate of pay would be?

A No.

Again, that was just assumed that he would be returned to the Foreman's wages that he had always drawn. And I directed our secretary that Mel was to be hired an his rate of pay was as a Foreman. He received the NAIU Foreman's rate of pay for a brief period of time.

When I discovered that he was not receiving General Foreman's wages, according to the NAIU contract, I had that raised. That roughly corresponded to the Grade 2 Foreman he had always received as an IBEW employee.

Q Did you discuss with him when he was hired what job, or jobs, he would be working on?

A The job that we had in mind for him was the Mervyn's Department Store at Highway 50 and Zinfandel that was just beginning. I don't recall if I had the first conversation with him or if Ted Choate did.

Q And, did you discuss exactly what the requirements of that job would be, how big a job it was going to be or how long it would take?

A I believe we joked that we had beaten Rex Moore by two-hundred dollars ($200.00) on the project and mentioned the size. But, Mel had done another Mervyn's store for us and he knew what was involved with the project.

[142] Q Now, did Mr. Miller start that Mervyn's job right away?

A That, say, was in the middle of winter and it was the beginning stages of the job. Our payroll records indicate that he spent approximately one week working at United Grocers before he returned to and ran the Mervyn's job.

I believe that someone else had installed the youfaground(ph) and possibly a couple of cans on the project prior to Mel returning to work.

Q On the Mervyn's project?

A Yes. But that was the extent of the work that had been done.

Q When Mel first came in to be hired was he given the plans for the Mervyn's job?

A I don't know.

Q Do you know if he was given any specifications?

A I don't know if he received them at that time. As Foreman on the job he certainly was given them. Whether it was that day or the following day or if they were on the job when he got there, I don't remember. That project was handled primarily by Ted Choate in our office. Ted was the Estimator who bid the project.

Q But, from the first time that – from the day that Mr. Miller was hired he was told about the Mervyn's job, is [143] that correct?

A Yes.

(Pause.)

Q Were there already employees on that Mervyn's job when he –

MS. SURE: I object.

I have not gotten clear as to what time the Mervyn's job was, what the date of the Mervyn's job was. The fine in issue was in May of 1982 and there has been no indication that this Mervyn's job was taking place at that time.

JUDGE POLLACK: All right.

When was the Mervyn's job?

THE WITNESS: The project began in January of 1982 and finished sometime in the summer of 1982.

MS. SURE: Again, there's been no indication that Mr. Miller was on the job at that time.

JUDGE POLLACK: Is that the job that Mr. Miller was on in May of 82?

THE WITNESS: Yes, he was on that job in May.

JUDGE POLLACK: Is that in May of 82 when the conduct was engaged in?

MS. SURE: Yes.

JUDGE POLLACK: All right.

And, these answers you've been giving about Mr. Miller's authority, that would be true in May of 82?

[144] THE WITNESS: Yes. It had always been true.

JUDGE POLLACK: Okay, that's what I thought. Fine.

Let's go on.

BY MS. WATSON:

Q Would they be true for any time period after the time where Mr. Miller was hired in January of 82?

A Yes.

Q Are they still in effect?

A Yes, they are.

Q Now, when Mr. Miller first came back to work for Nutter in the winter of 1982 did he work on any jobs other than Mervyn's?

A Yes.

When Mervyn's was shut down due to weather or the normal start-up delays he filled in at United Grocers.

Q And, what kind of job was United Grocers?

A United Grocers was primarily a distribution facility for grocery products. It contained roughly a half-million square feet of floor space, a separate maintenance building, a separate definable office area, a large general warehousing area, a refrigerated area and a freezer area. Plus the side work, some fifty acres or something.

Q Were there already crews with Foremen on that job?

A Yes, we had substantially started that project in roughly September of 81.

[145] Q Were the crews that were on that job from the National Association of Independent Unions?

A Yes, they were.

Q What was the purpose of sending Mr. Miller to the United Grocers job?

A There were several purposes. The prinicipal one is that the Mervyn's job was not ready. For a week at a time or a day or two it would either be rained out, and as a valuable supervising personnel you'd want to keep him busy so thepaycheck keeps coming and they stay happy. So, you look for an alternative home.

Secondly, United Grocers was possibly the largest electrical project in town at that time. As such, the personnel that we had from the NAIU were being taxed to complete it, although they did so very well, and we were anticipating that Mel's presence there while filling in would have a couple of added benefits.

One, we had a highly qualified person there and, secondly, he would set the standard that the NAIU personnel could seek to achieve.

Q Do you have any—you have other Foremen for Nutter, is that correct?

A Yes, we do.

Q Do you have any other Foremen who have—how does the authority and responsibility of the other Foremen that [146] you have for Nutter compare with the authority and responsibility of Melvin Miller?

A Mel is at the upper crust of that. Of course, various people have various degrees of ability. Mel was and still is the most capable person that we have and in keeping with the degree of ability, the responsibility that goes with it is appropriately altered.

Q Would you say, then, he has more responsibility and authority than your other Foremen?

A There are a couple of other people who share the same degree of responsibility and authority.

Q Has Mr. Miller ever run more than one job at a time for Nutter?

A Yes, on several occasions.

Q Since he came back to work has he?

A Yes.

(Pause.)

MS. WATSON: No further questions.

MR. NOVOTNY: Can the witness be shown General Counsel's Exhibit 11?

(Resporter hands to the witness.)

DIRECT EXAMINATION (cont.)

BY MR. NOVOTNY:

Q Do you remember giving a copy of this document to Mel Miller?

[147] A I do not remember handing him one, no, I do not. But, I believe he did receive one, I can't say from where. These documents were distributed primarily along with the material to the field with the request that the Foremen read them and we would discuss them with them subsequently.

At the initial dispersal of these documents they were allowed to read them and then we had a meeting and discussed it in general at that point.

Q What were Mel Miller's duties on the Mervyn's job?

A He had total responsibility for the project insofar as the field administration is concerned. His principal duties were to coordinate our work with the General Contractor and the various other subs on the contract; it was his responsibility to call for all inspections, to deal with the serving utilities at that level.

He also was responsible for ordering the material for the job; charged with the responsibility of ordering it sufficiently in advance, correct quantities, etcetera; he had the responsibility of requesting manpower, of assuring proper production from that manpower and taking whatever steps he thought appropriate if that production was not met, either in terms of talking with the person, teaching the person, or ultimately firing them if that became necessary.

He also, then, was responsible for laying his crews out and assigning individual work tasks to his people.

[148] Q What were his grievance adjustment responsibilities on the job as you conveyed them to him?

A Well, again, there was no direct conveyance. It had been as it had always been for the previous tenyears with Nutter. And basically that entailed, if someone was unhappy about a work assignment that he'd been give, Mel would handle it; if someone didn't like working with someone else, Mel handled it; if someone thought that Mel was too tough on them that was too bad because Mel was the last resort.

Q Did he have the authority to discipline employees or to recommend discipline?

A He had the authority to discipline and ultimately to fire.

Q Did he have the authority to transfer employees on the job?

A In the sense that it was his obligation to notify us that he had insufficient work for his personnel or that the work that he had, he had the wrong people for in terms of

their qualifications and hence to notify the office that these people were not needed and did we have another home for them. If not, send out there lay-off check.

Q Could he fire an employe for misconduct?

A Yes, he did.

Q Would he have to check with you first?

A No, he did not.

[149] Q And, are these duties generally consistent with his job duties prior to this Mervyn's job?

A Completely consistent.

Q Now, during the course of the United Grocers job did you ever ask Mel Miller's opinions about the other workers out there, Foremen or Superintendents or Journeymen?

A Yes, we did.

We faced what we felt was something of a political question so we used Mel in a covert fashion, you might say. We had established an NAIU crew there of thirty to forty-plus men at the time that Mel arrived. So, the job heirarchy was intact.

The previous 340 crew had been held up as the example for this NAIU crew to try to achieve. As such, we were concerned that if we sent Mel out, who was the most qualified person we had at that time, and had him take over that project that there might be sufficient unrest in the NAIU crew that we'd wind up paying the price, possibly, you know, have the crew say, "Hey, if you want 340 you should have stayed with 340, we're leaving."

And, we had personnel on that job that we felt were qualified. Not as qualified as Mel but the job was in progress and everybody was happy. So, we used Mel to set the example and we did ask Mel's opinion of the Foremen that were on the project for a couple of reasons.

[150] One, were a couple of them were as good and promising as we thought that they were? And, were a couple of others as shaky as we thought they were? He was

also there for the purpose of answering any questions that those Foremen had, and I know that they did ask him many times how to handle a situation.

Q Who reported that to you?

A Well, that was related from Mel in the—

* * *

[151] BY MR. NOVOTNY:

Q Now, turning your attention back to the time that Mel Miller fired an employee on the Mervyn's job, did the employee thereafter come in and talk to you?

A Yes.

He phoned first indicating that he'd been directed to leave the project and not return, that he was no longer employed. And, he was hoping that I would reverse that situation and asked to come in and talk to me. At that point in time I was not even aware that it had happened and so I phoned to the job site and talked with Mel. He explained the circumstances and I said, you know, "Well, Mel, I'm not looking to question your decision. I just want to know what happened so when the guy gets here I can talk to him."

And, the guy showed up and recounted essentially the same facts as Mel except with a different bias. And, I said, "Well, hey, look, Mel's decision stands. If you convince Mel that you repent and Mel decides to give you another chance, fine. Otherwise, you're fired."

Q Do you remember who he was?

A No, I don't recall the name.

MR. NOVOTNY: Nothing further.

MS. SURE: Were any statements given by Mr. Nutter?

MS. WATSON: Nothing.

[152] **CROSS EXAMINATION**

BY MS. SURE:

Q Mr. Nutter, you're aware that the IBEW 340 disclaimed interest in representing the employees of Nutter Electric on September 15, 1982, are you not?

A Yes, I am.

Q And, you're aware, then—

A Excuse me, 1981.

Q 1981, sorry.

And, your're aware that since that time there has been no contract between the IBEW 340 and Nutter Electric with respect to collective bargaining of terms and conditions of employment?

A That's correct.

Q And, in fact, no Union official has ever orally or in writing stated to you that they desired a contract with Nutter Electric?

A I have no contact with Union officials.

Q Since September of 1981?

A Correct.

Q And, in fact, your organization has entered an agreement with some other labor organization, right?

A That's correct.

Q So, there has been no bargaining obligation between your company and IBEW 340 since September of 1981?

[153] A Correct.

Q And, the IBEW Local 340 does not represent the employees of Nutter Electrical since September of 1981?

A Did you say Local Union 340?

Q Yes.

A That is correct.

Q Have you ever authorized—to your knowledge, is anyone authorized, other than Harold or yourself to bargain on behalf of Nutter Electric with any labor organization?

A The National Electrical Contractors' Association, Sacramento Chapter.

Q But, no employee of Nutter Electric?

A No.

Q And, that would include Mr. Miller and Mr. Choate?

A Yes, it would.

Q So, basically you conduct your business as though the IBEW Local 340 did not exist?

A That's correct.

Q And, whatever they do has no effect on your business?

A I don't know if I can go that far. They certainly can affect us. They have not.

Q They have not?

A They did throw the picket on the Mervyn's project that we referred to and it was there for approximately—

Q Well, they have not affected your business?

[154] A —three days.

Well, that had an affect on my business, yes.

JUDGE POLLACK: Don't interrupt his answers. You may not like them and you can move to strike if you have proper grounds, but let him finish.

MS. SURE: All right

BY MS. SURE:

Q That picket was an area standards picket, was it not, the picketing that you were not paying prevailing wages?

A I did not see a picket sign myself, I don't know what they said.

Q Now, at the United Grocers job when you sent Mr. Miller out there he was sent out there to do Journeyman work so that he could show the NAIU guys what a good Journeyman was like and how hard he could work and how much he could accomplish, is that correct?

A Not correct entirely, no.

Mr. Miller was sent out—first of all, let me say that we do not consider a Foreman appointed per job. We consider a Foreman to be a Foreman and he happens to be responsible for a job. But, when we have a Foreman visiting another job he is still there essentially as a Foreman and the practice that we encourage and the one

that, in fact, happened—and I think you can appreciate would logically happen—is, say, Foremen on Job A has Mel show up.

[155] He says, "Great, here's a guy I don't have to worry about. Here's the plans, you go over there and take care of that area." And, basically there has been a de facto segregation, a Foreman should control over a portion of the project.

Q Let me rephrase that question so we can get a little more specific.

Mr. Miller was not the Foreman, he was not directing these individuals out at the United Grocers job?

A Not directly, no.

Q He was not directing the individuals. You did not assign him out there to direct the individuals?

A We did not tell him to take over the project, no.

Q In fact, there were other Foremen directing the employees out there?

A That's correct.

Q So, at the time he was out there he was doing work as any highly-skilled Journeyman who would perform to the best of his abilities?

A Yes.

Q And, he was told to perform the job duties of the highly-skilled Journeyman on that job?

A In that those are incumbent within the duties of a Foreman to some extent, yes.

Q Well, the other duties of a Foreman he was not performing [156] out there to the extent that he was not told to direct the employees?

A He was working with other people on that project and those people, for the political reasons I explained earlier, were not told that "Mel is your Foreman"—

Q Fine.

A —he was de facto Foreman.

Q But, they were not told he was the Foreman—

A That's correct.

Q —and he was told not to direct those individuals with respect—

A That is not correct.

Q Well, there were other Foremen out there who were told to direct those individuals?

A That's correct.

And, they were asking Mel how to go about it.

Q But, those employees may not have known that?

A That's correct.

Q And, Mr. Miller had his tools at all times?

A I presume so, I don't know.

Q But, he was told to have his tools at all times and he was told to be working—

A He was not told that. He was told to go to United Grocers. The presumption was that he would take his tools, yes.

[157] Q And, the presumption was that he would be working out there so that they would know what the example of a good Journeyman worker was?

A He would be working a portion of the time with the tools, yes. It was also presumed that his abilities as a Foreman were also to be utilized. Even though he was not called the Foreman of that job, as I indicated earlier, we considered him to be a Foremen on that project in the broader sense.

To answer officially to other Foremen and ultimately the Superintendent on that job. But, we considered—

Q I think I've gotten the answer. I don't mean to interrupt him—

JUDGE POLLACK: Okay.

MS. SURE: —but he's gone on past my question.

JUDGE POLLACK: I take it from what you said, then, that he received Foremen's pay while on that particular job?

THE WITNESS: Mel has received the highest Foreman's wage every day that he's worked for Harold Nutter.

BY MS. SURE:

Q And, by the highest Foreman's wage you're saying that he was receiving what he would have been receiving had he remained IBEW? I just wanted to be sure of that.

A No.

Q What was your statement, then, in answering Ms. Watson's [158] question? You wanted to make sure that he has been receiving the wages that he's been receiving previously.

A In terms of level of Foremanship. We know that the NAIU wages, of course, are less than the IBEW wages were at that time. As a 340-member – well, 340 prior to the strike had two groups of Foreman, they had a Foreman Grade 1 and a Foreman Grade 2.

And, Mel had always received the Grade 2 Foreman, the second level of Foremanship. And in the NAIU the contract recognizes only Foreman and General Foreman and Mel was raised, say, after a couple of days or a week, whatever it was that we discovered the error, to that second level of Foremanship – titled, if you will, under the NAIU as General Foreman, but still the second level of Foreman.

Q And, that would be somewhat comparable to what he would be making under the IBEW contract?

A The dollars and cents were still less. In terms of status and ranking of position they were the same.

Q How long was he out at the United Grocers job?

A A very short time, really. I don't remember the total off-hand. But, the Mervyn's job had essentially started. I indicated that someone else had been there ahead of him to can and put in the yufabrown(ph). We were fighting with rain.

But, the started the slab, and the slab in a Mervyn's [159] store is quite complicated. There is a high number of floor boxes that have to be placed with an extreme degree

of accuracy, a higher degree of accuracy than in most stores. And so there was immediate substantial work on the project.

Q Well, was he out at the United Grocers job for a month or two months?

A No.

Q How long.

A Our records indicate that he was there for one week, that first week, and that subsequent to that he spent the majority of this time on the Mervyn's project. He would bounce in for a day of rain or a couple of days of rain or if on normal job conditions he wasn't needed for a day or two.

But, after that first week he was primarily at the Mervyn's job.

Q Did Mr. Miller, to your knowledge, have an interaction with the NAIU?

A Not to my direct knowledge, no. I don't know if he did one way or the other.

Q Do you know of any grievances that were filed out there by the NAIU that he would have to handle?

A Yes.

The reference earlier to the gentleman who was fired from out there, I understand that—well, I know—Bruce [160] Norman visited the job site to speak with Mel and subsequently came in and talked with me also about it. And, basically I simply reiterated Mel's position, that I didn't see anything wrong with, that I support it, it's his decision.

Q And, that was the end of the greivance?

A Yes, it was.

JUDGE POLLACK: All right, just so the record indicates, Bruce Norman was the Business Representative of the NAIU?

THE WITNESS: That's correct.

BY MS. SURE:

Q Now, Mr. Choate, what level is Mr. Choate with respect to Mel?

A Ted would be superior to Mel. Ted is our Vice-President.

Q So, Mel would be reporting to Ted Choate as to the progress of the job?

A Our organization is structured that he could report either to Ted or to myself, that difference dependent upon who estimated the project. In the case of Mervyn's—and United Grocers for that matter—Ted estimated and ran both of those jobs from the office, so Mel reported there.

Subsequently Mel has done 1515 K Street, an apartment structure, and a couple of others that I happened to have been responsible for and so Mel has reported to me.

* * *

[161] **REDIRECT EXAMINATION**

BY MS. WATSON:

Q On jobs which you estimate how often would you say you visit the job site?

A Not nearly enough. It probably averages once a month, not that we're caught up.

Q Do you know if the same would hold true for jobs which Mr. Choate estimates?

A Ted tends to get to projects far less than I do.

Q Mr. Choate does no actual job site supervision, does he?

A No, he does not.

Q He works strictly in the office as an Estimator?

A That's right. He visits the job sites for the sole purpose of checking the general condition of the project.

Q And, you have no other job site Superintendents who would be between you and Ted and a Foreman like

Mel, the authority of, say, an overall job superintendent or something like that, do you?

A We had a General Field Superintendent at the time Mel was hired. His name was Everett Engel. Everett's primary responsibility became United Grocers and, in fact, we specifically [162] told Everett that he was not to intercede between Mel and the office, that Mel needed no additional supervision.

Q Is Mr. Engle still there?

A No. Mr. Engel has left our employ and we have not replaced that position.

(Pause.)

Q You have contracts with other IBEW Locals, do you not?

A Yes, we do.

* * *

REDIRECT EXAMINATION (cont.)

BY MR. NOVOTNY:

Q Has Local 340 picketed Nutter Electric since September 15, 1981?

A Yes.

Q Do you recall which job they picketed?

A They picketed the Mervyn's project that Mel was on.

[163] Q And, you stated that that did cause disruption to Nutter?

A Yes, it did.

Q And, would it also be disruptive to Nutter Electric if Mel Miller left your employment?

A Very, very much so.

* * *

[164] MELVIN K. MILLER

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE POLLACK: Please give us you name and address for the record.

THE WITNESS: Melvin K. Miller, 6229 Gold Dust Drive, Sacramento.

DIRECT EXAMINATION

BY MS. WATSON:

Q You're employed by Harold E. Nutter, is that correct?

A Yes.

Q And, when were you first employed by Nutter?

A 1974.

Q You worked for Nutter until during the strike in 1981, is that correct?

A Yes.

Q And, before the strike what was your job position?

A I was supervising jobs.

Q Did you ever work for Nutter as a Journeyman?

A No.

Q After the strike in the summer of 1981 when did you come back to work for Nutter?

[165] A Oh, let's see. It was about two weeks after the strike. I came back from a job I was on in Redding.

Q After the strike was over when did you come back to work for Nutter?

A Oh, after the strike, excuse me. That was on January the 25th of 82.

Q Before the strike what was the last project that you were working on for Nutter?

A I was doing a job in Redding, a shopping center.

Q And, how many employees did you have on that job?

A I had as many as twenty.

Q Did you have any Foremen under you?

A Yes.

Q How many?

A Two.
Q Did they report to you or did they report to Norman or Ted?
A They reported to me.
Q On that job did you ever work with tools?
A No.
Q What was your authority on that job?
A Supervising the job?
Q Did you layout the work?
A Yes.
Q Did you work with the plans?
[166] A Yes.
Q Did you handle any kind of problems on the job with discipline or personality problems, things like that?
A No.
Q Did you have the authority at that time to handle problems if they came up?
A Yes.
Q When you came back to work for Nutter in January of 82 did you speak to Norm about what your job duties and authority would be?
A More or less it was going to be under the same—I was going to be in the same position I was before the strike.
Q The same position as what?
A I was before the strike, as a Supervisor running jobs.
Q Did Norm say that there would be any differences in your authority or your duties?
A No.
Q Did you discuss the new union, the NAIU?
A No, not really.
Q Did Norm discuss with you what job you would be working on, job or jobs?
A Yes.
Q And, what did he say?

A They had a Mervyn's job that was starting up and they wanted me to run that job for them.

[167] Q Did he describe to you specifically what you would be doing as far as running that job?

A Supervising the job.

Q He didn't go into any greater detail than that?

A No.

Q Did you ask him any other details?

A No.

Q Did he give you the plans at that time for the Mervyn's job?

A Yes, the plans were on the job.

Q When you first began work they were on the job already?

A Yes.

Q Did you discuss whether you would be working with the tools on that job?

A No.

Q Now, when you were on the job at Mervyn's how big a job was that?

A Oh, dollar-wise I don't know, but it took several men.

Q How big was the building that was involved?

A I don't know, just a normal size Mervyn's store.

Q A department store building?

A Yes.

Q Did it have several floors to it?

A Just one floor.

[168] Q That job was—that building did not have a roof on it at the time that you began, is that correct?

A Right.

Q It was being built from the ground up?

A Yes.

Q And, who bid that job?

A I think Ted Choate bid that job.

Q Did you have any kind of a pre-job conference or a job walk or anything on the Mervyn's?

A No.

Q Did Ted take you out to Mervyn's and say, "Here's what you should be doing"?

A No.

Q He just gave you the plans?

A Yes.

Q Were there already employees working on the job when you arrived?

A Yes, there was one man there.

Q One?

A One.

Q And, how many employees were there eventually on the job?

A There were several, seven.

Q When you started this Mervyn's job what was the first thing that you did?

[169] A Read the plans, look at the plans and order material, and check in with the General Superintendent on the job.

Q Was there a General Contractor on the job?

A Yes.

Q Besides an owner there was also a General Contractor?

A Right.

Q Did you confer with the General Contractor about what should be done and when?

A Yes.

Q When you ordered material how did you go about ordering material for that job?

A We have a shop man in there and I just call him and give him the order, then he delivers it to the job.

Q Now, by a shop man you mean—

A Material Handler.

Q When you wanted to order some material for the job did you have to ask Norm or Ted first as to what quantity you wanted to order or what type of material?

A No.

Q Did you ever order any equipment for that job?

A No, that was all ordered ahead, as far as switch gear, that type of thing, fixtures.

Q Would you have had the authority to—did you have the authority to order necessary equipment if you had needed it?

[170] A Yes

Q How would you have done that?

A Probably talked to Ted about it.

Q Did Ted or Norman ever question the amounts of materials that you ordered or the type of materials that you ordered?

A No.

Q Did you do any paperwork on that Mervyn's job?

A Sure.

Q What kind of paperwork?

A Oh, I had to keep the time up and changes, addendums, revisions came out.

Q What kind of changes would you be keeping track of?

A Well, for example, they would either add some outlets or fixtures or that type of thing.

Q And you would have to log these in a journal?

A Well, yes.

As a rule you kept track of the material and the labor on it.

Q Did you keep a daily job journal?

A No.

Q But, you did keep track of any changes that were made?

A Yes.

Q Did you ever make any changes on that Mervyn's job from the plans?

[171] A As a rule, if there were any changes made they would usually send an addendum through the shop and the shop would deliver it to me.

Q Who would send the addendum?

A Ted.

Q Would it be sent to him from the General Contractor?

A Yes.

Q Did you ever see any changes on this job that you thought should be made?

A There were a couple of times that I did make—just go ahead and do the changes.

Q What kind of changes were those?

A Added outlets.

Q Did you clear those with Ted or Norman before you made those changes?

A No.

Q Did you talk to the General Contractor before you made the changes?

A Yes.

Q How often in the course of that Mervyn's job did you confer with the General Contractor.

A As a rule, every day.

Q What about other sub-contractors, did you have any contact with them?

A Sure.

[172] Q Did you—who was responsible for coordinating your work with the work of the other sub-contractors on the job?

A The General Contractor.

Q Did you ever have to work—arrange your work around someone else's work, say, another sub-contractor?

A Sure.

Q How did you go about doing that?

A Well, as a rule, you get together with them and find out what elevations they're going to be running and whatever. So, you have to just work it out as you go along.

Q And, who made the decisions as to how to do that?

A After we conferred, why, I would make that decision on how it was done.

Q Did you clear that with Ted or Norm?

A No.

Q Did you have any safety problems on that Mervyn's job?

A No.

Q Did you ever send anyone home because of inclement weather?

A Yes.

Q Who decided when to send them home?

A I did.

Q Did you check that with anyone at the office?

A No, but as a rule I would call them and tell them what [173] I did so that they would know what was going on.

Q Would you call and see if there was anywhere else for these people to work?

A Yes.

Q Was this fairly common on the Mervyn's job?

A Yes.

Q Why was that?

A It was a wet winter.

Q Did you assign—was there any overtime on that Mervyn's job?

A No.

Q Do you have the authority to assign overtime?

A Yes.

Q Have you done it in the past?

A I haven't had to, no.

* * *

[174] Q How do you know that you have the authority to authorize overtime? Has anyone ever told you that?

A Well, when you're supervising a job you have to authorize some authority.

Q Now, on that Mervyn's job did you do layout?

[175] A Yes.

Q And, how much of your time would you say was spent with laying out the job?

A Oh, probably most of my time.

Q And, can you explain to us what you mean by laying out the job?

A Well, they have different elevations for outlets and they give specific measurements and that type of thing.

Q And, what would you—

A So, what I would do is just lay it out on the floor and then put the height down on the floor and then the fellows would come in and put the outlet in and pipe it in.

Q And, you would get those measurements from the plans and from the specifications?

A Right.

Q Then somebody else would actually do the installation?

A Right.

Q On that job who assigned the work as to which person would do what work?

A I did.

Q Who determined when a particular type of work was to be done?

A I did.

Q After the Mervyn's job got started and you saw that you needed more employees how were those extra employees [176] hired?

A Well, as a rule I would call Ted and ask him, or tell him that I needed more help. And something they would transfer somebody from another job to me or just hire somebody new.

Q Who determined the number of employees that were needed to do the work?

A I did.

Q Did Ted ever question your judgment on that?

A No.

Q Did you ever ask for anybody by name?

A No.

Q Did you ask for them by qualifications sometimes?

A Sometimes.

Q Was this ever questioned?

A No, not really.

Q If you had too many employees on the job and didn't have enough work for all of them what did you do?

A Usually notified Ted that I had to let somebody go and either transfer them to another location or just have to lay them off.

Q Did they ever question your judgment as to the number of employees that—

MS. SURE: Objection.

MS. WATSON: should have been laid off?

[177] MS. SURE: She's asked a speculative question and he hasn't said that it ever happened.

MS. WATSON: I don't believe it was couched in terms of speculation.

BY MS. WATSON:

Q Were employees laid off from that Mervyn's job because of lack of work?

A Yes.

Q And, was the procedure followed that you just described?

A Yes.

Q Did Ted or Norm ever question your judgment as to how many employees needed to be laid off?

A No.

(Pause.)

Q Did you ever have any problems on the job with employees being late?

A Yes.

Q And, what happened in the situation?

A Well, if they do it very often you just have to caution them about it.

Q Did this happen on the Mervyn's job?

A Yes.

Q And, what did you tell them?

A I told them to either get here on time or get replaced.

[178] Q What happened?

A They got there on time.

Q Did you check with Norm or with Ted before you warned them about their lateness?

A No.

Q Did you have any problems with any other—any other kind of disciplinary problems or personality problems with any of the employees on the Mervyn's jobs?

A I just had one, one young fellow.

Q And, what happened there?

A Well, he had quite a temper and whenever I tried to show him something, why, he would get a little irritated. He felt that the fellow that he was working with should have told him that instead of me. So, his temper flared up a little bit and he threw his hammer and all that type of thing.

So, I just told him to pack up his tools and get off the job.

Q And, did he?

A Yes.

Q Did you clear that with Norm or Ted before you sent him packing?

A No.

Q What happened after that?

A Oh, let's see. I think he called Norm and then went [179] in and talked to Norm. I hadn't talked to Norm at that point and then Norm called me.

Q This was after you had sent him from the job site?

A Yes.

Q Then what happened?

A Well, evidently Norm told him that when I run him off the job that was it.

Q Did you ever deal with anybody from the NAIU about this firing?

A Well, yes, he brought the NAIU representative out and he felt that he had a grievance there. But, there was nothing ever done about it.

Q Did you talk to the NAIU representative?

A Yes.

Q What did you tell him?

A Just his mannerisms, temper, that type of thing.

Q As far as you know was that employee ever rehired?

A Not with Nutter, no.

Q Have you ever granted any time-off to employees on that Mervyn's job for personal reasons, like a doctor's appointment?

A Sure.

Q How many times would you say you did that?

A Oh, at least maybe a dozen times.

Q Did you have to clear that with anyone?

[180] A No.

Q How did you work around that, if you granted somebody some time off and you needed another employee?

A Well, if he took an hour off or two hours off, why, that just went on his timecard, he just got paid for what he worked.

Q What if he took a day or two off?

A If he took a day or two off—it depended on the job, how fast it was moving, on whether I could spare him.

And, I usually worked it out to where they would take off when the right time came.

Q Who determined when the right time was for him to take off?

A I did.

Q Did you have to clear that with anybody at the office?

A No.

As a rule, I let them know, though.

Q When you were out at that Mervyn's job did you do any work with the tools?

A No.

Q Did you carry tools with you?

A Did you have a job shack or an office or anything at the site?

A Yes.

Q What kind of—

[181] A I had a trailer.

Q How much of your time would you say in the average week you spent actually in the trailer working with the plans?

A Well, I actually didn't spend too much time in the trailer. During the day probably an hour a day.

Q And, what did you spend the rest of the time doing?

A The rest of the time laying out jobs for the fellows, seeing that everything got put in right, and maybe somebody needed a piece of material and I happened to be going that way and I'd drop it off to them or something.

Q Did you do any electrical installation work at all on that job?

A No.

Q Have you ever recommended anyone for a raise or a promotion?

A Yes.

Q Who was that?

A His name was Larry Miller. He was an Apprentice.

Q What did you recommend him for?
A I just recommended him for a raise.
Q Who did you make the recommendation to?
A To Norm Nutter.
Q Do you know if that was followed?
A Yes. He got his raise.
Q Did you ever recommend anybody to be Foreman?
[182] A Sure.
Q Do you recall who that was?
A Francis Brenner.
Q Did you recommend him to be a Foreman, did you appoint him to be a Foreman, how did this work?
A I just appointed him to be a Foreman.
Q Did you clear that with Norm or with Ted?
A No.
Q Did you tell them afterwards?
A Yes.
Q How often did Ted visit the job site at Mervyn's?
A Oh, probably three or four times.
Q During the course of how many months?
A Four months, five months.
Q Would you ever switch any employees from one job or another in order to give them more experience on one type of task, or anything like that?
A No.
Q Did you have the authority to do that?
A Yes.
Q Did you have the authority to switch an employee around from one task to the other if he had asked you to?
A Sure.
Q Now, after Mervyn's job was over you were still working for Nutter—

[183] * * *

Q After you were on the Mervyn's job were you running other jobs for Nutter?
A Yes.

Q Did you run more than one job at once?

A Yes.

Q What were those jobs?

A We had three going: an office building at 1112 I [184] Street and an office building at 1515 K and an office building at 2nd and R.

Q Did you have any Foremen under you at any of those jobs?

A No.

Q What was the largest number of employees at any of those jobs?

A Fourteen.

Q Was your general authority while running those three jobs the same as your authority had been when you were at Mervyn's?

A Yes.

Q Did you ever switch anybody from one of those job sites to another?

A Yes.

Q Did you clear that with the office before you did it?

A No.

Q Whose decision was it to switch those people?

A It was mine.

Q Did you ever authorize any overtime, say, on Saturday on any of those jobs?

A No.

(Pause.)

Q Now, when you were on the United Grocers job when was that?

[185] A That was in March of 82.

Q Were you there the first week of your employment?

A Yes.

A Was that before your work at Mervyn's began?

A Yes.

Q Then after that did you spend most of your time at Mervyn's?

A Yes.

Q When you were out on the United Grocers job did anyone on that job ever come to you for advice or help with electrical problems?

A Occasionally.

Q Did the Foremen ever come to you for advice?

A Yes.

Q Did you ever correct any work on that job?

A Yes.

Q Did you ever show employees how it should be corrected?

A Yes.

(Pause.)

Q Who decided when there wasn't enough work for you at Mervyn's so that you should work somewhere else, like United Grocers?

A As a rule, Ted.

Q Did you tell him how much work was ongoing?

A No. I would usually call him and tell him that it was [186] raining and that it was a problem. And he'd just sent the people home. And as a rule they tried to keep me busy, so they sent me out to United Grocers.

Q And, United Grocers was, that building was already built, right?

A Yes.

Q It was covered?

A Yes.

Q So, you could work inside?

A Yes.

Q And that was not true at that time at Mervyn's?

A Right.

(Pause.)

Q When you were cited for working at United Grocers do you remember seeing someone on the job site who talked to you about being cited by the Union?

A Yes.

Q Who was that?
A Jay Cox, I think it was. Cox.
Q And who is Mr. Cox?
A He was one of the Journeyman Electricians on the job.
Q Working for some other contractor?
A Yes.
Q You knew Me. Cox, right?
A Yes.
[187] Q Had you worked together before?
A Yes.
Q And, had he worked for you an an employee?
A Yes.
Q Were you the Foreman when he was working for Nutter?
A Yes.
Q Did he ever work for you when youwere anything other than a Foreman?
A No.
Q Did Mr. Cox ask you when he talked to you on that day what you were doing on the United Grocers job?
A No, he knew. He knew what it was all about.
Q Did he ask you if you were a Foreman?
A No.
Q Did he say anything to you about why he was citing you?
A No.
Q When you were out at various times on that United Grocers job did Ted or Norm ever ask your opinion as to the quality of any of the Foremen out there or the employees?
A Yes.
Q And, how many times did they ask you about that?
A Oh, not too often.
Q Did you give them your opinion?
A Yes.

[188] Q Did they ever ask you about the potential of any employees out there to be Foremen?

A I don't remember.

Q Other than after the United Grocers job have you done any work with the tools for Nutter since you came back in January of 82?

A No.

(Pause.)

MS. WATSON: Nothing further.

DIRECT EXAMINATION (cont.)

BY MR. NOVOTNY:

Q What's the longest job you were on since you returned to Nutter after the strike?

A I guesss it was 1515 K.

Q How long did that job last?

A Six months.

Q What was your largest crew on that job?

A I had twelve.

Q Was that the job you had a Foreman on?

A Yes.

Q You say you worked on a Redding job for the company prior to the strike?

A Yes.

Q Did you have any authority over the company's finances on that job?

[189] A I carried a checkbook, yes.

Q Did you write checks on Nutter's behalf on that project?

A Yes.

Q And, were your job duties basically the same on the Mervyn's job as they were on the Redding job?

A Yes.

Q The Mervyn's job started sometime in February of 82?

A Yes, around the first or second of February, something in there.

Q How long did that job last?

A Until June or July, about the middle of July.

(Pause.)

Q And, what was your largest crew on the Mervyn's job?

A I think about seven.

Q And, you did have the authority to hire on that job?

* * *

[190] Q You did have the authority to hire on the Mervyn's job?

A Yes.

Q And, what would you do to hire?

A Call Ted Choate.

Q And he would send men?

A Yes.

Q And, you actually did lay off men at that job?

A Yes.

Q How many did you lay off?

A I think about four.

Q Do you have the authority to resolve any personality conflicts on the job?

A Sure.

Q Did you do that at Mervyn's?

A I didn't have to.

Q Have you done that on any other jobs you've worked at for Nutters since you returned after the strike?

A No.

Q Do you have the authority to resolve disputes over working conditions on the job?

A Yes.

Q And, have you had to do that since you returned after [191] the strike?

A No.

Q Was the Mervyn's job picketed by IBEW Local 340 at any time you were out there?

A Yes.

Q Did you personally observe the picketing?

A Yes.

Q Has anybody from Local 340, any officer or representative, to your knowledge asked you about your job position at Nutter?

A No.

Q Since you came back to work for Nutter?

A No.

* * *

CROSS EXAMINATION

BY MS. SURE:

Q Mr. Miller, how long were you an IBEW member?

A Thirty-two years.

[192] Q And, do you recall that at the time you began your membership with the IBEW that you entered into a contract with them and you took an oath?

A Yes.

Q And, you understood that there was a Constitution and Bylaws which govern a member and his union?

A Yes.

Q When you went back to work for Nutter you were still, to your knowledge, an IBEW member, you were not?

A Yes.

Q You're aware that the IBEW disclaimed interest in representing the employees of Nutter in September of 1981?

A Sure.

Q And, you're aware that the IBEW did not have a contract with Nutter in May of 1982?

A Yes.

Q And, anytime subsequent from September of 81 they did not have a contract?

A Sure.

Q But, you retained your membership in the IBEW and continued to work at Nutter Electric?

A Yes.

Q It's a fact, is it not, that you were never put in the position of performing any kind of collective bargaining for Nutter with any union, were you? Were you authorized to [193] do collective bargaining with the union for Nutter Electric?

A No.

Q And, you are not authorized, were you, to actually adjust a grievance with the Union, were you, for Nutter?

A Can you explian that a little bit more?

A Well, were you authorized to adjust—if a grievance were filed by the union, by any union, with Nutter were you authorized to resolve that grievance?

A Not with the union, no.

Q You did not appear to testify or rebut any of the charges, did you?

A No.

Q And, I'm referring to the Union fines against you.

A The assessment, yes.

Q And, you read that charge as it was sent to you, did you not?

A And, the charge said that you were pulling wire and doing work out at the United Grocers job?

A Yes.

Q And, you didn't go and rebut that to the Union Trial Board, did you?

A No. It wouldn't have done any good.

Q Well, it was true, wasn't it?

A It wouldn't have done any good.

Q It was true, wasn't it?

[194] A Well, it's true, yes.

Q In fact, out at the United Grocers job you were filling in, in a sense, because they wanted to keep you busy because of the rain, right?

A Yes.

Q So, at that time you were working with the tools out United Grocers?

A Yes.

Q Full time with the tools?

A Yes.

Q You carried your tools and you were doing all the Journeyman work like everyone else was?

A Yes.

It was just a day or two here and there and that's about what it amounted to.

Q And, that's when the Union individuals from the other signatory contractors saw you working?

A Yes.

(Pause.)

Q What was the name of your Foreman out at the United Grocers job?

A Everett Engel.

Q Was he the fellow from Oregon, or where was he from?

A No.

Q Not Everett Engel?

[195] Was this Engel fellow the only Foreman out there for all of you people at the United Grocers—

A No, actually Evertt Engel was the Superintendent on that particular job. And I think he had maybe four or five Foreman.

Q It was Everett Engel and then five Foremen. Then how many people like you were working out there?

A I don't know exactly off-hand how many were there.

Q Twenty?

A Not that many. Maybe fifteen.

Q Fifteen of you guys were working out there?

A About that.

Q Were the Foremen working also or were they not working?

A Some were, some weren't.

Q But, you guys were all working?

A Yes.

Q So, you were doing the work—and correct me if these aren't the right verbs for electrical work—but you were installing conduit?

A No, I was not installing conduit.

Q Pulling wire?

A Pulling wire.

Q Hanging fixtures?

A No.

[196] Q Installing plugs or switches?

A No.

Q Setting motor controls?

A No.

Q Mostly just pulling wire on this job?

A Mostly just pulling wire.

Q What other kind of stuff?

A I wasn't there that long. It was just like I was there a day or maybe two days and then it quit raining and I could go back on the Mervyn's job and then maybe spend the rest of the week there. Then if it rained over the weekend or whatever, why, then I'd have to come back to the United Grocers job for a day or two or whatever.

Q So, on those days you were just pulling wire?

A Yes.

Q And, you would not be directing the other employees as to what they were supposed to do, were you?

A Usually there was two or three of us pulling the wire and I was pretty much in charge of that.

But, that was just because everyone was pulling wire? They had their own Foreman, didn't they?

A Yes.
Q Are you familiar with any NAIU contract?
A Some.
Q Have you ever seen it?
[197] A I don't remember whether I have or not.
Q You don't recall seeing it?
A No, I don't recall seeing it.
Q Do you have any idea if they have any kind of a hiring hall or any system like that?
A Oh, sure they have a hiring hall.
Q Have you ever called there?
A No.
Q Do you know where it is?
A No.
Q Well, do you know how the men are hired by Nutter? Are they hired through the hiring hall or are they hired any other way?
A Most of them are hired through the hiring hall.
Q Who calls them, Norm or—
A Norm or Ted call them.
Q So, out at the United Grocers job you didn't lay off any men, did you?
A No.
Q You didn't hire any men?
A No.
Q You didn't fire any men?
A No.
Q You didn't transfer any men?
A No.
[198] Q You didn't authorize any overtime?
A No.
Q You didn't adjust any grievance?
A No.
(Pause.)
MS. SURE: No further questions.

* * *

[204] MS. SURE: We call Robert Ennis.
Whereupon,

ROBERT ENNIS

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE POLLACK: Would you please give us your name and address for the record?

THE WITNESS: Robert H. Ennis, 2216 Arles Way, Sacramento, California.

JUDGE POLLACK: Can you spell your last name, please?

THE WITNESS: E-N-N-I-S.

DIRECT EXAMINATION

BY MS. SURE:

Q Mr. Ennis, are you an IBEW Local 340 member?

A Yes, I am.

Q How long have you been a member?

A Twenty-eight years.

Q Now, approximately March of 1982 where were you working?

A United Grocers warehouse on West Sacramento.

[205] Q Who were you working for?

A MHE Contractors.

Q That was electrical work?

A That was an electrical contractor, yes.

Q How long had you been out there?

A (Pause.)

About two months, a month and a half.

Q So, since January—

Q As soon as the project started for the conveyors I was the fifth Electrician for MHE on the job.

Q Were there any other electrical contractors doing work out there aside from MHE?

A Nutter Electric.

Q And, was the work being done by Nutter Electric in the same proximity or the same area as the work being done by MHE?

A Yes, all over the building.

Q How close was the work being done?

A Side by side.

Q Do you know who a Melvin Miller is?

A Oh, yes.

Q Did you ever have occasion to see him doing work out at United Grocers?

A Absolutely.

Q Can you tell us under what occasions that you may have [206] seen him work out there, whether it was—you know, what period of time?

A Oh, I think he showed up in March and he worked there for at least a month. You know, he worked just like we were working, he pulled wire and he just did general electrical work.

Q So, the times that you saw Melvin Miller out at the United Grocers job he was pulling wire and just doing electrical work?

A Just working like we were working, with the tools.

Q Did you at any time ever see him direct work for other Electricians to do?

A Absolutely not.

Q How can you say that?

A Well, most of the work that we were doing went on in the freezer area and the loading area in front of the freezers and the period of time that he was there they were pulling wire in the freezer. And when they weren't pulling wire he was with a crew of guys. And if he wasn't doing anything he'd just be standing around, like an Electrician waiting to be given an order to do something.

Q And, in fact, did you ever see someone come and give him an order?

A Absolutely.

Q Was this person giving orders to other people out there?

[207] A Yes.

Q Do you happen to know his name?

A There were two of them. One was named Don—I can't think of his last name. He was also cited, he was an ex-IBEW. And, the other guy was Lonnie something-or-other, and I can't remember his last name either. But, he ran the job, Lonnie was out there the longest of anybody that I know of from Nutter, he was there a long time.

Q And, these two individuals were directing all of the other employees out there?

A Yes.

Q Including Melvin Miller?

A Yes.

Q Was Miller wearing tools?

A All the time.

Q Were you a witness with respect to the charge that was preferred against Melvin Miller?

A I was.

Q And, at the Trial Board did you relay that you had seen Mr. Miller working with the tools?

A Absolutely.

Q Did you relay that at all the times you saw him working in fact he was working with the tools?

A Yes. I mean, he never did supervise. All the time he was doing electrical work.

[208] Q Now, if Mr. Miller had been working out at some other site, like Mervyn's would you have any knowledge as to what he did out there?

A No.

Q So, your only knowledge and the only knowledge you gave the Trial Board was what you saw at United Grocers?

A Right. What he was cited for was working with the tools at United Grocers. The only time I've seen him other

than today was there, in my whole life. I don't even remember ever seeing him at a Union meeting.

MS. SURE: No further questions.

JUDGE POLLACK: Ms. Watson?

CROSS EXAMINATION

BY MS. WATSON:

Q Mr. Ennis, you didn't see him every day in March, did you?

A There were very few days that we worked that I didn't see him, that he was there. Because we worked in the same area.

Q But, you didn't see him every day?

A Yes, I would say I saw him every day

Q You're sure you saw him on that job every day?

A Every day that he was there that he worked.

Q Well, you don't know whether he worked there every day in March?

[209] A Oh, no, I don't know that. I couldn't possibly know that.

Q And, you really don't know how many days in March he worked, do you?

A Oh, not how many days. But, I say I know for a fact that he worked for two weeks because we worked side by side for at least two weeks. That's the first two weeks he came there and then they moved farther back into the freezer and after that I didn't see him ever single—

Q You really have no idea, other than those two weeks—

A That's what he got cited for.

Q —how he worked at United Grocers—

A Right.

Q —or how long?

A I mean, you see him coming into the building. I didn't see him working, but you'd see him coming in and sometimes leaving.

Q So, you really only saw him off and on for two weeks?

A Oh, no. Off and on for a month and a half.

Q But, in the same area you were working?

A In the same area I was working in?

Q Yes.

A No, a month and a half.

(Pause.)

MS. WATSON: I don't have any more questions.

[210] MS. SURE: Carl Monroy.

* * *

[211]Whereupon,

CARL MONROY

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE POLLACK: Would you please give us your name and address for the record?

THE WITNESS: Carl Monroy, 5204 Lakecrest Avenue, Carmichael.

DIRECT EXAMINATION

BY MS. SURE:

Q Carl, you're an IBEW Local 340 member, are you not?

A Yes, I am.

Q How long have you been a member of the IBEW?

A About thirty-seven years.

Q Have you ever had occasion to work out at the United Grocers job?

A Yes, I have.

Q What kind of work were you doing out at the United Grocers job?

A We were doing a conveyor system out there for MHE Contractors.

Q How long were you out there approximately, do you recall?

A From February 8 until August the 19th.

Q Was MHE an IBEW 340 contractor?

[212] A No, they worked from, I think, Grand Rapids, Michigan. They do all of this work for United Grocers.

Q But, they were—you were working there through the IBEW 340?

A Yes, I was working out of 340.

Q Was there any other electrical contractor out there doing work?

A Nutter.

Q Were they working near you?

A Oh, yes, They were working right along—well, not right alongside of us, but right in the same area.

Q And, had you ever occasion to see an individual named Melvin Miller working out at the United Grocers job?

A Oh, yes, I saw him there for quite a while.

Q What was he doing when you saw him there?

A He was pulling wire. The first time I seen him they had wire to pull. I didn't even know the man until they told us who he was. Then, when I first seen him, he was pulling wire. But, he done other work, I mean, they were doing other work, they didn't just pull wire all the time.

Q Was he wearing his tools?

A Yes.

Q Was he working with tools?

A Yes.

Q Did you at any time see him directing other employees [213] as to what to do?

A No, there were directing him what to do.

Q Who is "they", do you know who was directing?

A Well, they had a Foreman there from Oregon that was also cited, and he was the fellow that told them what to do. And they had a guy over there that looked like sort of a guy that was doing most of their telling, and he wasn't supervision either, he was just working there and he was doing most of the telling.

Q Most of the what, now?

A Most of the telling of what to do there.

Q Oh, I see.

A Outside of his Foreman being there I don't know any other supervision that was there.

Q But, there was some Foreman that was directing everyone as to what to do so?

A Yes.

Q Now, the days that you saw Mr. Miller out there was there any time that you recall that he was not doing general Journeyman work?

A He was always doing Journeyman work. I mean, the same as we did, just working with the tools.

Q Were you one of the witnesses at the Trial Board?

A At our Local, do you mean, when – yes, I was called in there when he was being cited. It's been so long now [214] that I don't remember what it was all about.

Q Did you relay that you had seen him working with his tools?

A Oh, yes.

Q And, would you have any knowledge as to what he did if he worked at some other job, like Mervyn's?

A I wouldn't know that.

Q So, the only thing that was discussed at the Trial Board was what you saw him do at United Grocers?

A Yes.

They said they wanted to know who he was and, I think – all I was on that was just a witness because I wasn't the one who cited him on that.

Q You just testified what you saw?

A Right.

(Pause.)

MS. SURE: No further questions.

* * *

[216] MS. SURE: Charlie Lux.

Whereupon,

CHARLIE LUX

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE POLLACK: Please give us your name and address for the record.

[217] THE WITNESS: Charlie Lux, 6140 West Second Street, Rio Linda.

JUDGE POLLACK: Is that L-U-X?

THE WITNESS: Yes.

DIRECT EXAMINATION

BY MS. SURE:

Q Mr. Lux, you're an IBEW 340 member, aren't you?

A Right.

Q How long have you been a member?

A About eleven years.

Q Have you every had occasion to see a Mr. Albert Schoux working?

A Yes, I have.

Q On what occasion was that?

A I was out at Aerojet.

Q What were you doing out at Aerojet?

A I was sent out there with Morris Electric to set some electrical switch gear and that's when I ran into him.

Q And, what was he doing when you ran into him out there?

A He was mounting a disc connect on a concrete pillar and working in the vicinity. I was out there for two days.

Q And, how long did you see him out there?

A Those two days.

Q And, on those two days was he at that same place?

[218] A In that vicinity, yes. I did distinctly see him on that one day mounting a disc connect and doing electrical working in the area.

Q And, was that work that is typically done by a Journeyman Electrician?

A I would say so, yes.
Q Did he have tools on him?
A Yes.
Q Do you recall what he had?
A Just a standard tool pouch and then he had a rotor hammer and the disc connect and what it takes to mount it on concrete.
Q How close were you to him these days that you were working out there?
A Oh, fifty or sixty feet.
Q And, at the time that you saw him out there did he have any people working for him?
A I don't know that for sure.
Q Okay.
And, did you cite Mr. Schoux?
A Yes.
Q Did you cite him for this work that you saw him doing out there?
A Right.
Q And, did you relay that to the Trial Board?
[219] A As to how—
Q As to what you saw him doing out there?
A Mounting the disc connect on the—yes, that's what he was doing.
Q Okay.
(Pause.)
MS. SURE: No further questions.

* * *

[222] LEROY FRITH

having been first duly sworn, was called as a witness herein as was examined and testified as follows:

JUDGE POLLACK: Mr. Frith, can you give us your name and address, please?

THE WITNESS: Leroy Frith, 6502 Engel Road, Carmichael.

DIRECT EXAMINATION

BY MR. NOVOTNY:

Q Mr. Frith, you were the Business Manager of IBEW Local 340 until June of this year?

A July of this year.

Q And, you occupied that position in 1981, did you not?

A Yes.

Q And, you negotiated with the Sacramento Valley Chapter [223] of NECA for a new agreement in 1981?

A Yes.

Q And, the negotiations reached a stalemate in September or August of 81?

A June 11th.

Q June 11th of 81, okay.

And, the Union disclaimed interest in representing the employees of employers in the NECA multi-employer unit on September 15, 1981?

A Yes.

Q Now, by issuing that disclaimer the Union disclaimed interest in representing all employees of all employers who NECA represented, correct?

A I think that's what the disclaimer said.

Q Sometime after the disclaimer you had a conversation with an attorney who purported to represent some of Nutter's employees, correct?

A (Pause.)

Yes.

Q Do you remember if you had a conversation with Mr. Robert Horn?

A I believe that's who it was.

Q Okay.

And, you discussed the possibility with Mr. Horn of filing a Representation Petition covering Nutter's employees [224] with the NLRB, did you not?

A I don't recall that.

Q You don't recall that.

Do you recall discussing filing an RC Petition on Nutter's employees with Walter Hurst?

A No, I don't recall that either.

Q What did you discuss with Horn?

A We had our attorney there and I don't know that this is not priveleged information.

Q Well, I don't want anything that you have said between you and your attorney.

A Well, my attorney was there representing me and the other attorney was representing his people. But, it wasn't with regards to negotiations, I can tell you that.

Q Okay.

The Local Union was interested at that time in representing Nutter's employees, was it not?

A At that particular time?

Q Yes.

A I don't think so.

Q What time was this, first of all?

A I'm not sure of the dates.

Q Was it October of 81, or possibly a month after the disclaimer?

A I think it was—I'm really not sure of the date.

[225] Q Okay.

How many meetings did you have with Mr. Horn?

A As I recall, one.

Q And, what did you discuss regarding Local 340's representation of Nutter's employees?

MS. SURE: I'll object at this point. If, in fact, our attorney was present there may be confidential attorney-client—

JUDGE POLLACK: Well, why would it be priveleged just because an attorney is there? The attorney-client privelge deals with communications between a client and the attorney and the attorney and the client and it usually doesn't apply when a third party is present.

MS. SURE: I just want to make sure the question is directed to only those discussions which were when the third party was present.

JUDGE POLLACK: Okay, fine. That makes sense, sure.

BY MR. NOVOTNY:

Q Do you recall what discussions actually took place at that meeting?

A I think the meeting was called to see if we would pay the bill for the people working for Harold Nutter because they had an unfair labor charge that they could file against Nutter. As I recall that's what the meeting was about.

Q You could pay a bill?

[226] A Yes, if I would pick up the tab for it. And, I told them, no, I wasn't interested. If they had a charge they could take it to the Board and it wouldn't cost them anything. If they wanted to hire an attorney they'd have to pay for it themselves.

As I recall it that was the gist of the conversation.

Q And, your testimony is that you did not agree, with Horn or with anyone else, to file a Representation Petition with the Board covering Nutter's employees?

A I do not recall that being any part of the discussion. The information I just gave is what I recall that the meeting was about.

Q Okay.

Do you remember who Walter Hurst was?

A Oh, not really. I think he was an assistant to Horn or something. The only contact I've had with him is that he was called in to testify when we were downstairs, I think.

JUDGE POLLACK: In the Grason trial?

THE WITNESS: Yes, I believe so.

BY MR. NOVOTNY:

Q And, you had no conversations with him regarding a Representation Petition for Nutter?

A Not to my recollection, no.

Q All right.

[227] Sometime after the disclaimer you met with Ted Mosely, the International office representative, to discuss the labor dispute involving Local 340, is that correct?

A I think he was a member of a task committee that was sent out here from Washington, D.C. which was made up of the NECA and the IBEW.

A He was here on a factfinding mission?

A Yes.

Q And, that mission occured sometime in November of 81?

A I don't recall the date.

Q Okay, was it within a month or two after the disclaimer?

A I think it was, but I don't recall the date.

Q All right.

And you, in fact, told Moseley that you had agreed to file a petition on behalf of Nutter's employees, did you not?

A Not that I recall.

Q You never made any statements to Moseley?

A I don't recall.

JUDGE POLLACK: Mr. Moseley is with the International?

BY MR. NOVOTNY:

Q Is Mr. Moseley with the International office of the IBEW?

A Yes. At least he was at that time.

[228] JUDGE POLLACK: Do you know what his position was, his title?

THE WITNESS: No, I think he was an Assistant to the President or something like that.

JUDGE POLLACK: Okay.

MR. NOVOTNY: I want to distribute a document dated November 9, 1981 called "Memorandum Re: Sacramento Assignment" from Ted Mosely to Charles H. Pillard. This will be Charging Party's 6.

(The document referred to was marked for identification as Charging Party's Exhibit No.6)

Mr. Frith, please turn to page seven of the document and read the last paragraph to yourself.

(Pause.)

THE WITNESS: I don't recall—I've read it but I don't recall this being the text of it.

JUDGE POLLACK: Okay, Mr. Frith, wait for the question.

BY MR. NOVOTNY:

Q Does this document refresh your recollection that you actually told Ted Mosely of a plan by Local 340 to file a petition on Nutter?

A No.

Q It does not?

[229] A No.

Q And, you still don't recall telling Moseley that?

A If he'd a been part of it he would have been one of the seventeen.

Q Do you recall telling Moseley that, if properly handled, the petition could have a domino effect on other NAIU employees formerly working for non-union contractors?

A I think those are his words, not mine.

Q Those are his words.

(Pause.)

Do you know whether IBEW Local 340 has kept a copy of this document in its normal course of business?

A This document here?

Q Yes.

A I doubt if we even have it.

Q Were you sent a copy of it after Moseley made his report?

A No.

Q What's the first time that you saw the document?

A I don't think I've ever seen it in its entirety, but I think I glanced at it, probably, at one of the hearings that we were in.

Q You did talk to Mr. Moseley about Nutter, did you not?

A It could be that all of the contractors were mentioned [230] but I don't recall specifically talking to him about Nutter.

Q Well, do you have any reason for believing that the statements contained in this memorandum are not true?

A No, I don't.

But, again, these are his words, not mine. Maybe I discussed with him about talking to Horn, but the statement that I just gave regarding the charges that they wanted to process and us pick up the tab was the basis of the whole thing. And, I told him to forget it. They can attach whatever significance they want to it.

Again, I don't recall these specific words.

Q Now, after the disclaimer—September 14, 1981—Local 340, in fact, had an intent to organize every electrical contractor in the Sacramento area that would be willing to sign an agreement with Local 340, is that correct?

A I don't know that that's absolutely correct. I think that the object of a Local Union is to organize, but I think that our first concern was to organize the seventeen and get an agreement and an association established before we made any kind of plans on anything else.

Q Did you ever make a statement at any hearing or did you ever testify before anywhere else that it was the intent of the Local Union to organize every electrical contractor in the Sacramento who would be willing to sign an agreement with 340?

[231] A I think I just now inferred the same thing.

Q But, did you ever testify that—

JUDGE POLLACK: Did you say those words, that's what he wants to know.

BY MR. NOVOTNY:

Q Did you say those words in prior testimony?

A I don't recall whether I did or not.

Q Okay.

Did you give testimony in the matter of Arden Electric?

A I think I covered the whole field.

Q And, do you recall answering a question by your attorney, Robert Jessinger, of whether it was your intention after the disclaimer to sign contracts with each individual member of the Sacramento Valley Chapter NECA bargaining group? Do you recall giving testimony to that?

A No, I don't.

MR. NOVOTNY: Your Honor, may I show him his prior statement?

JUDGE POLLACK: Sure.

Just so the record is clear, when you referred to Arden and I referred to Grason we're talking about the same case. We know that but somebody reviewing the record might not.

BY MR. NOVOTNY:

Q Would you read into the record what your testimony to [232] that question I just posed?

A You want me to read 17(A)?

Q Yes.

A "My intention was—

MS. SURE: No, not out loud, to yourself I believe he wanted it.

THE WITNESS: I can't read it into the record to myself.

MS. SURE: Did you ask him to read in into the record?

MR. NOVOTNY: I did.

JUDGE POLLACK: Go ahead.

MS. SURE: Well, now the only purpose it would be to read it into the record is if it were an inconsistent statement, and at this point it's not been shown to be inconsistent at all.

MR. NOVOTNY: Mr. Fritch did not recall it.

MS. SURE: But, it's still not—even as you have represented it it's not inconsistent.

JUDGE POLLACK: All right. I'll overrule the objection. Go ahead.

THE WITNESS: "My intention was to organize every electrical contractor in the jurisdiction of (blank) that was willing to sign an agreement with Local 340, IBEW."

No, that's no different than my position has been all the way along, and I just made a statement—

[233] MR. NOVOTNY: Well, I appreciate that—

THE WITNESS: —that eventually down the road we had plans that we would get an agreement and get the thing moving and anyone that was willing to become a part of the new organization, they were welcome.

BY MR. NOVOTNY:

Q Okay, so you were contemplating—the Local Union was contemplating forming a new association?

A The Union was not contemplating forming anything.

Q I'm sorry.

The Local Union was contemplating bargaining with a new association in Sacramento?

A After it was formed, absolutely.

Q Okay.

And, according to the Local Union any former NECA contractor who wished to become a member of this new association was free to do so?

A As far as we were concerned.

Q And, Local 340 would welcome that action, would it not?

A If a person wanted to become organized how could we turn it down?

Q That's fine.

Now, approximately ten days after the Local Union served the disclaimer on NECA the Union filed seventeen

[234] Representation Petitions against former NECA members, or members of the NECA bargaining unit, is that correct?

A I don't recall whether all of them were or not. I think they were, though. In fact, I couldn't even tell you who they are right now.

Q All right.

Seventeen employers, though?

A Yes.

Q And, the purpose of filing that petition was to get all IBEW contractors possible back to an agreement, is that true?

A I would say that, basically if you're saying that we're trying to get our employers that had our people working back under an agreement, that's exactly what we were trying to do.

Q All right.

And, by your contractors you meant former NECA contractors who had been represented by the association in negotiations?

A Any contractor.

Q Any contractor. Any contractor of NECA?

A If these seventeen contractors were a part of the NECA then that's a true statement.

Q Would that include also other contractors represented by NECA?

[235] A (Pause.)

Q Were you also interested in filing those petitions in encouraging other contractors in NECA to come back to the IBEW fold?

A Ultimately down the road it was our hope that everybody would be back under an agreement. The seventeen, we filed on those because we figured that those seventeen people were good, solid IBEW employers. It was a judgment call and those seventeen were selected. It wasn't a hundred percent correct but it was partially correct.

Q Basically as I understand it, then, the Local's intent of issuing the disclaimer was to oust NECA as the bargaining representative and negotiate as many individual contracts as possible with former members of the bargaining unit?

A That isn't true when you use the term "oust NECA".

Q You didn't want—

A The answer to that is no.

Q Okay, you didn't—

JUDGE POLLACK: Mr. Novotny, wait until he finishes his answer.

MR. NOVOTNY: All right.

BY MR. NOVOTNY:

Q You didn't want to bargain with NECA any further?

A We couldn't bargain with NECA any further at the time. [236] Mark Thierman. And, I don't know if he was involved or not. But, that was—we were completely bound at the time.

Q I'm asking you again whether it was the Local's intent of, if not ousting, at least eliminating or not bargaining with NECA anymore so that you could get as many individual IBEW agreements with NECA contractors as possible without NECA in the picture?

A It was our intent to get as many employers signed up as we could.

Q All right.

Now, can the witness be shown General Counsel's Exhibits 3, 5 and 7.

(Reporter hands to the witness.)

And, can the witness also be shown a copy of the IBEW Constitution, GC 9?

(Hands to witness.)

Mr. Frith, reviewing the fines against Ted Choate and Mel Miller and Al Schoux, all of these individuals were fined under Article XXVII, Section 1, Subsection 6 of the

IBEW Constitution, were they not? And, take your time to verify that.

(Pause.)

A Okay.

Q All three were fined under that provision?

A That's what it says.

[237] Q Okay.

And, reading along in the IBEW Constitution, that provision applies for—that it is a penalty to "work for, or on behalf of, any employer, employer-supported organization or other union, or representatives of any of the forgoing whose position is adverse or detrimental to the IBEW", is that correct?

A That's what it says.

Q Now, Nutter Electric and Royal Electric were formerly signatory to agreements with Local 340, is that correct?

A Yes.

Q And they are right now non-signatory?

A Not signatory.

Q And, the reason they are non-signatory is because the Local Union disclaimed interest in representing their employees, is that correct?

A That's partially correct and partially not correct.

Q Why is it not correct?

A Because the International's position is that the disclaimer is invalid.

Q All right.

It is Local 340's position, is it not, that the disclaimer was valid and that these employers are not signatory at this moment?

A 340's position is that if the International—if any [238] of these employers told the International they wanted to sign an agreement, they would have an agreement.

Q The Local told the International that?

A No.

If any employer involved in this today called the International and wanted an agreement they would have an agreement.

Q Is the Local Union interested in obtaining new agreements with Nutter and Royal at this time?

A I can't speak for the Local any longer.

Q Okay.

As of June of 83, last month, was it the Local's interest in recognizing these employers with a new agreement?

A Had Nutter or Royal Electric walked into the office and said, "I want to sign an agreement", I don't think I could have turned it down.

Q Now, the reason these employers are non-signatory at this momement, though, is because the Local Union disclaimed interest in representing their employees?

A I'm not going to quarrel that with you and I can't give you an answer without quarreling.

JUDGE POLLACK: All right.

I mean, there was no objection, but I think the point being made by the witness is right and I think you're beginning to argue with him. He's answered the question [239] before. You might not like the answer, but I think he's answered it.

MR. NOVOTNY: All right.

BY MR. NOVOTNY:

Q Now, these individuals were also fined under Article XXVII, Section 1, Subsection 7 of the IBEW Constitution, is that correct? You can verify—

A Yes, I did.

Q Okay.

And, this provision provides that it is contrary to the Constitution to "wrong a member of the IBEW by an act, or acts, causing him physical or economic harm". Now, how were these individuals causing Local 340 economic harm?

A How? By stealing their jobs, ratting on them.
Q They're stealing their jobs?
A Sure.
Q Okay.
A That's how they got them in the first place.
Q And, is the reason they're stealing these jobs is because they're non-signatory employers? They're working for non-signatory employers?
A Certainly.
(Pause.)
Q It is fair to say, then, that the fines were at least partly aimed at encouraging these individuals to go back to [240] work for IBEW employers?
A I can't hear you.
Q Is it fair to say that at least one object of these fines was to encourage these individuals to go back to work for IBEW employers so that they would not cause the Local economic harm?
A I don't know the intent of the Trial Board.
Q Well, in what other way could they cease causing the Local economic harm than by going back to work for signatory contractors?
A You're asking me for an opinion now?
Q I am.
A My opinion would be that the more qualified you are the more help you're giving them, and the more help you're giving them the more damage you're creating to the other people that don't get involved in something like that.
Q In fact, there is really no other way these individuals could cease causing the Local economic harm than by going to work for IBEW signatory contractors, correct?
A I didn't understand the question.
Q All right.
There is no other way they could not cause the Local economic harm than by going back to work for signatory contractors? That's the way they could not cause the Local economic harm, is that correct?

[241] A If they didn't work for them they wouldn't be creating any harm to any of their brothers, that's true.

Q So, they could avoid the economic harm to the Union if they either stopped working for the employer or worked for an IBEW signatory contractor, right? One of those two?

A I would think that would be reasonably—a reasonable assumption on your part, yes.

MR. NOVOTNY: I have no further questions.

JUDGE POLLACK: Ms. Sure?

CROSS EXAMINATION

BY MS. SURE:

Q Mr. Frith, subsequent to September of 1981 the IBEW 340 had no contract with Nutter Electric, is that correct?

A That's correct.

Q And, the IBEW 340 had no collective bargaining relationship with Nutter Electric?

A That's correct.

Q And, the IBEW 340 had no contract with Royal Electric at that time either?

A That's correct.

Q Now, is it not accurate to say, then, that with respect to the general premise of the Union that at any time an employer wants to have a contract with the Union an employer can come in and seek a contract with the Union, that's the general premise of the Union?

[242] A That's correct.

Q Is that the position that you would put Nutter and Royal in if they were to seek a contract with the Union under the general premise that any employer can comein and have a contract?

A When I was in offfice I couldn't have looked at it any other way.

Q So, when you respond that the Union would have a contract with them it's because the Union at all times would have a contract with any employer who sought a contract with the Union?

A That's correct.

Q But, in fact the employers that the Union wanted to continue doing business with were the employers who desired to continue doing business with the Union, the Union filed Representation Petitions on them, did they not?

A That's correct.

Q And, these were the employers who the Union did desire to continue doing business with?

A That's correct.

Q And, at that time the Union did not indicate any desire to continue doing business with Nutter or Royal, did they?

A No.

Q And, since then has the Union—during the time that [243] you were Business Manager did the Union indicate any desire to continue to have a contract with Nutter or Royal, aside from the general premise that the Union would have a contract with any employer who desired a contract?

A No contact was made through the Local Union, if that's what you're asking.

Q And, you authorized on contact, did you, by a Union official to anyone from Nutter or Royal to seek out a contract with them?

A No.

Q Did you ever at any point authorize any Union official to go seek out authorization cards from Nutter employees?

A No.

Q Did you at any time yourself go out and seek out the representation of Nutter or Royal employees?

A No.

Q To your knowledge did anyone from Local 340 in writing send out any contracts to Nutter or to Royal showing the contracts that the IBEW had outstanding?

A No.

Q Now, you heard testimony with respect to picketing of Nutter. To your knowledge, after September of 1981 what form of picketing was done with respect to Nutter?

A Informational with regards to wages and working conditions.

[244] Q Is this what is termed "area standards picketing"?

A Yes.

Q Was there at any time any recognitional picketing or picketing which would seek out a contract with Nutter?

A No.

Q So, was the purpose of your picketing, then, to maintain the area standards?

A That's correct.

(Pause.)

Q Now, when you say the purpose of fining individuals under the pretext that they are causing economic harm is that not the section that you use for any fine with respect to any individual who is working for a non-union employer?

A I would think so.

You have to remember that I never sat on the Trial Board as Business Manager, so I don't have the clear thinking of the Board.

Q You can't speak to the insight as to those who instituted the fine, but your insight with respect to citing on that section would be that that would be one of the sections used whenever any Union member would be working for a non-union contractor?

A That's correct.

Q And, with respect to the section cited for the breach of the contract and the oath, are those also typically used [245] for individuals working for non-union employers?

A Yes, but not totally. For most violations those are used.

Q Now, to your knowledge the most recent Assent for Royal Electric was—was it an Assent A or an Assent B?

A B.

Q Now, if a contractor had an Assent A with the Union and then at a later point came in and sought out an Assent B what would the Union do?

A I've had it happen and I just—if the contract is in effect at this time I just tell them, "Give your notice to the association and when the negotiations are concluded we'll sign a B."

Q And, you would have no way of knowing whether or not the association got that notice? That was up to the employer?

A No, not unless they sent me a copy of it.

Q In fact, the International approved the Letter of Assent B on Royal, did they not?

A Yes.

* * *

[246] BY MS. SURE:

Q In fact, did Royal Electric at any point sign an interim agreement as an Assent B with the Union?

A In 1976.

Q And, were these interim agreements under the auspices of NECA or were they, again, independent interim agreements signed by Assent B's?

A Independent interim agreements. They were signed by A's also.

Q Did NECA enter into an interim on behalf of employers at that time?

A No. In fact, they took some of their A signers to court.

Q The ones who did enter into the—

A Except for one that we're talking about now.

Q Royal?

A If he had an A they didn't take him.

Q So, in 1976 when NECA took the employers who signed interim agreements into court they did not take Royal into court?

[247] A That's correct. And he was signed on a B.

(Pause.)

Q So, with respect to the Nutter employees, you at no time indicated to either—the Nutter employees subsequent to September of 1981—did you at any time indicate to any Nutter employee or to any individual who held himself out to be the lawyer for the Nutter employees that you would take on any responsibility with respect to representing those employees?

A No.

Q In fact, did you affirmatively say you would not take on that responsibility?

A The question wasn't with regards to organizing. The question was withregards to the funding required for the attorney to process unfair labor charges.

A And you said no?

A I said absolutely not. They had other directions they could go.

Q And, you at no time sent out any Business Agent to a Nutter or Royal job site to sign-up employees, did you?

A No.

Q Did you ever go out yourself to try and sign-up employees?

A No.

Q This is post-September of 81?

[248] A The answer is no. For Nutter and Royal.

* * *

REDIRECT EXAMINATION

BY MR. NOVOTNY:

Q Now, you say that the picketing against Nutter after the disclaimer was normal area standards picketing?

A Yes.

Q Do you recall what the wording on a typical picket sign would be?

A (Pause.)

There was a place for the name and it said, in this case here, "Nutter Electric does not pay the prevailing wages and fringes as established by Local Union 340, AFL-CIO". And, that's close, I don't know if that's exact or not, but it's close.

Q So, the prevailing wages you were picketing for were [249] those outlined in the then present IBEW Local 340 agreement?

A Yes.

Q And, to your knowledge, at that time Nutter was not paying wages and benefits commensurately with the IBEW 340 agreement?

A Yes.

* * *

General Counsel's EXHIBIT 2

LOCAL UNION 340
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS

CERTIFIED

November 2, 1982

James Choate
7516 Hickory Avenue
Orangevale, CA 95662

Dear Sir and Brother;

You are hereby notified to appear before the Trial Board of Local Union 340, IBEW, meeting at 535 Fulton Ave., Sacramento, on Monday, November 15, 1982, at 7:30 p.m., to answer charges filed against you by Brother Lee Frith, Card No. D11624, for alleged violation of:

IBEW Constitution, Art. XXII, Sections 3 and 4

IBEW Constitution, Art. XXVII, Section 1, subsections 1, 6 and 7

Enclosed is a copy of the original charge filed against you. You may bring witnesses to give evidence in your behalf. You will be afforded an opportunity at the hearing to present any relevant evidence and to cross-examine any witnesses you may desire. You may, if you desire, have an *IBEW member* act as you counsel.

Fraternally,
ELECTRICAL WORKERS UNION
Local No. 340

/s/MICHAEL W. DYBA

Michael W. Dyba
Recording Secretary

EXHIBIT 2

11/1/82

Recording Secretary
IBEW – Local Union 340
5841 Newman Court
Sacramento, CA 95819

Dear Sir and Brother;

I, Lee Frith, Card No. D11624, a member of Local Union 340, IBEW, hereby prefer charges against Brother James R. Choate, Card No. D107429 a member of Local Union 340, IBEW, whose last known mailing address is 7516 Hickory Ave., Orangevale, CA 95662, for alleged violation of the following:

BY-LAWS – Article __, Section __, Subsection __
Article __, Section __, Subsection __
Article __, Section __, Subsection __
Article __, Section __, Subsection __
Article __, Section __, Subsection __
Article __, Section __, Subsection __

CONSTITUTION – Article XXII, Section 3 & 4, Subsection _____
Article XXVII, Section 1, Subsection 1
Article XXVII, Section 1, Subsection 6
Article XXVII, Section 1, Subsection 7
Article __, Section __, Subsection __
Article __, Section __, Subsection __

The alleged violation occurred on 10/26/82 at approximately 11:30 (a.m.) at 535 Fulton Avenue, Sacramento.

The alleged violation occurred as follows; Jim Choate has been a member of the IBEW for 26 years and has not terminated his contract with the IBEW. He has not fur-

thered the purposes of the IBEW and has sacrificed it's interest in the following manner; working for an employer who is no longer signatory to an IBEW agreement with Local Union 340. Jim Choate has wronged other members of the IBEW by causing economic harm.

WITNESSES:

Fraternally,

[sig illegible]

General Counsel's EXHIBIT 3

LOCAL UNION 340
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS

CERTIFIED

November 16, 1982

James Choate (D107429) L.U. 340
7516 Hickory Avenue
Orangevale, CA 95662

Dear Sir and Brother;

The Executive Board, sitting as a Trial Board of Local Union 340, IBEW, on Monday, November 15, 1982, after due consideration of the evidence produced, has acted upon the charges filed against you by Brother Lee Frith.

The charges alleged you violated:

IBEW Constitution, Art. XXII, Sections 3 and 4

IBEW Constitution, Art. XXVII, Section 1, subsections 1, 6 and 7

The decision of the Trial Board is as follows:

It is the decision of the Trial Board that James Choate, Card #D107429, is employed by Nutter Electric, who is no longer signatory to an I.B.E.W. Agreement with L.U. #340. This conduct violates the following.

Guilty of violating I.B.E.W. Const. Art. XXII, Sec. 3—assessed $4,000.00.

Guilty of violating I.B.E.W. Const. Art. XXII, Sec. 4 and Art. XXVII, Sec. 1, subs. 1—no assessment.

Guilty of violating I.B.E.W. Const. Art. XXVII, Sec. 1, subs. 6—assessed $1000.

Guilty of violating I.B.E.W. Const. Art. XXVII, Sec. 1, subs. 7—assessed $1000.

Total assessment due—$6,000.00

EXHIBIT 3

Any member who claims an injustice has been done him by the Trial Board may appeal. (See Article XXVII of the IBEW Constitution.) Appeals from the decision of the Trial Board must be directed to International Vice President, S.R. McCann, IBEW, Ninth District, 150 No. Wiget Lane, Suite 100, Walnut Creek, CA 94598.

Appeals to the Vice President MUST state in writing:

1. Your reasons for claiming an injustice has been done you by the Trial Board.

   NOTE: Where an assessment has been levied, include Items 2 and 3; otherwise, eliminate.

2. When assessment exceeds twenty-five dollars ($25), twenty dollars ($20) must be paid directly to the Local Union or mailed with a postmark date not later than fifteen (15) days after the decision was rendered, which was on the 17th day of November.
3. In order to keep an appeal active, additional payments to the Local Union of not less than twenty dollars ($20) must be paid within each succeeding thirty (30) day period from date of first payment until the decision is rendered by the Vice President.
4. Appeals to the International Vice President must be postmarked within forty-five (45) days from the next Local Union Meeting which will be on the 13th day of December 1982.
5. A copy of the appeal sent the Vice President shall be furnished to the Local Union Business Office.
6. If the above Constitutional provisions are not met, your appeal will not be considered timely or in order.

7. For further details, see appropriate enclosed sections of the IBEW Constitution.

Fraternally,

/s/MICHAEL W. DYBA

Michael W. Dyba
Recording Secretary

General Council's EXHIBIT 4

LOCAL UNION 340
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS

CERTIFIED

SECOND NOTICE

January 19, 1983

Albert L. Schoux (D173986)
16247 Jericho Rd.
Grass Valley, CA 95945

Dear Sir and Brother;

You are hereby notified to appear before the Trial Board of Local Union 340, IBEW, meeting at 535 Fulton Ave, Sacramento, on Monday, February 7, 1983, at 8:00 p.m., to answer charges filed against you by Brother C. Lux, Card No. D245161, for alleged violation of:

IBEW Constitution, Art. XXII, Sections 3 and 4

IBEW Constitution, Art. XXVII, Sec. 1, subsections 1, 6 and 7

Enclosed is a copy of the original charge filed against you. You may bring witnesses to give evidence in your behalf. You will be afforded an opportunity at the hearing

to present any relevant evidence and to cross-examine any witnesses you may desire. You may, if you desire, have an *IBEW member* act as your counsel.

Fraternally,
ELECTRIC WORKERS UNION
Local No. 340

/s/MICHAEL W. DYBA
Michael W. Dyba
Recording Secretary

Exhibit 4

December 20, 1982

Recording Secretary
IBEW – Local Union 340
5841 Newman Court
Sacramento, CA 95819

Dear Sir and Brother;

I, Charles C. Lux, Card No. D245161, a member of Local Union 340, IBEW, hereby prefer charges against Brother Albert Schoux, Card No. D173986 a member of Local Union 595, IBEW, whose last known mailing address is 16247 Jericho Rd., Grass Valley, CA 95945, for alleged violation of the following:

BY-LAWS – Article __, Section __, Subsection __
Article __, Section __, Subsection __
Article __, Section __, Subsection __
Article __, Section __, Subsection __
Article __, Section __, Subsection __
Article __, Section __, Subsection __

CONSTITUTION – Article XXII, Section 3 & 4, Subsection _____
Article XXVII, Section 1, Subsection 1
Article XXVII, Section 1, Subsection 6
Article XXVII, Section 1, Subsection 7
Article __, Section __, Subsection __
Article __, Section __, Subsection __

The alleged violation occurred on 12/14/82 at approximately _____ (a.m./p.m.), at Aerojet, Bldg. #2009.

The alleged violation occurred as follows; Brother Schoux has been a member of the IBEW for 24 years and has not terminated his contract with the IBEW. He has not furthered the purposes of the IBEW and has sacrificed it's interest in the following manner; working for an employer who is no longer signatory to an IBEW agreement with Local Union 340. Brother Schoux has wronged other members of the IBEW by causing economic harm.

WITNESSED

FRATERNALLY.

/s/ CHARLES LUX

Charles Lux

General Counsel's EXHIBIT 5

IBEW
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS
1125-Fifteenth St. N.W.
Washington, D.C. 20005

Charles H. Pillard	Ralph A. Leigon
International	International
President	Secretary

February 22, 1983

Mr. Michael Dyba, Rec. Sec.
Local Union No. 340, IBEW
535 Fulton Avenue
Sacramento, CA 95825

RE: Albert Schoux
Card No. D173986

Dear Sir and Brother:

Notice of the action taken by your Local Union against this member has been received here. This action has been filed for future reference. If the member clears his record with your Local Union, please notify us at once to clear our records.

Best Wishes.

Fraternally,

/s/ RALPH A. LEIGON
Ralph A. Leigon
International Secretary

LOCAL UNION 340
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS

CERTIFIED

February 11, 1983

Albert Schoux
16247 Jericho Rd.
Grass Valley, CA 95945

Local Union #595
Card #D173986

Dear Sir and Brother;

The Executive Board, sitting as a Trial Board of Local Union 340, IBEW, on Monday, February 7, 1983, after due consideration of the evidence produced, has acted upon the charges filed against you by Brother C. Lux.

The charges alleged you violated:

IBEW Constitution, Art. XXII, Sections 3 and 4

IBEW Constitution, Art. XXVII, Section 1, subsections 1, 6 and 7

The decision of the Trial Board is as follows:

Brother Schoux, Card #D173986 was performing bargaining unit work while employed by Royal Electric. This conduct violates the following:

Guilty of violating I.B.E.W. Constitution Art. XXII, Sec. 3—assessed $2,500.

Guilty of violating I.B.E.W. Constitution Art. XXII, Sec. 4 and Article XXVII, Sec. 1. subs. 1—no assessment.

Guilty of violating I.B.E.W. Constitution Art. XXVII, Sec. 1, subsection 6—assessed $2,500.

Guilty of violating I.B.E.W. Constitution Art. XXVII, Sec. 1, subsection 7—assessed $3,200.

Total assessment due—$8,200.00

Any member who claims an injustice has been done him by the Trial Board may appeal. (See Article XXVII of the IBEW Constitution.) Appeals from the decision of the Trial Board must be directed to International Vice President, S.R. McCann, IBEW, Ninth District, 150 No. Wiget Lane, Suite 100, Walnut Creek, CA 94598.

Appeals to the Vice President MUST state in writing:

1. Your reasons for claiming an injustice has been done you by the Trial Board.

   NOTE: Where an assessment has been levied, include Items 2 and 3; otherwise, eliminate.

2. When assessment exceeds twenty-five dollars ($25), twenty dollars ($20) must be paid directly to the Local Union or mailed with a postmark date not later than fifteen (15) days after the decision was rendered, which was on the 11th day of February 1983.
3. In order to keep an appeal active, additional payments to the Local Union of not less than twenty dollars ($20) must be paid within each succeeding thirty (30) day period from date of first payment until the decision is rendered by the Vice President.
4. Appeals to the International Vice President must be postmarked within forty-five (45) days from the next Local Union Meeting which will be on the 14th day of February 1983.
5. A copy of the appeal sent the Vice President shall be furnished to the Local Union Business Office.
6. If the above Constitutional provisions are not met, your appeal will not be considered timely or in order.

7. For further details, see appropriate enclosed sections of the IBEW Constitution.

Fraternally,

/s/MICHAEL W. DYBA

Michael W. Dyba
Recording Secretary

General Counsel's EXHIBIT 9

IBEW Constitution

And Rules for Local Unions and Councils under its jurisdiction

As amended at the 31st Convention,
Atlantic City, New Jersey,
October, 1978

. . .expelled by, or indebted to any L.U., without consent of the I.S. and without first consulting the last L.U. of which the applicant was a member in regard to his character and record. The I.P. shall decide any case in dispute.

Sec. 2. Each applicant for membership shall fill out an application blank furnished or approved by the I.S., and answer all questions. The original application or a copy must be sent to the I.S.

Sec. 3. The acceptance of an application for membership, and the admission of the applicant into any L.U. of the I.B.E.W., constitutes a contract between the member, the L.U. and the I.B.E.W., and between such member and all other members of the I.B.E.W.

Sec. 4. Each applicant admitted, shall, in the presence of members of the I.B.E.W., repeat and sign the following obligation:

"I ....., in the
(Give name)

presence of members of the International Brotherhood of Electrical Workers, promise and agree to conform to and abide by the Constitution and laws of the I.B.E.W. and its local unions. I will further the purposes for which the I.B.E.W. is instituted. I will bear true allegiance to it and will not sacrifice its interest in any manner."

Sec. 5. The obligation card signed by the applicant shall be sent to the I.S.

The L.U. shall have each applicant, except as provided in Section 10 of this article, take the obligation before a regular meeting, or if it so decides, this may be done outside the regular meeting, or if it so decides, this may be done outside the regular meeting in the presence of the president or the vice president or the recording secretary.

Sec. 1. Any member may be penalized for committing any one or more of the following offenses:

(1) Violation of any provision of this Constitition and the rules herein, or the bylaws, working agreements, or rules of a L.U.

(2) Having knowledge of the violation of any provision of this Constitution, or the bylaws or rules of a L.U., yet failing to file charges against the offender or to notify the proper officers of the L.U.

(3) Obtaining membership through fraudulent means or by misrepresentation, either on the part of the member himself or others interested.

(4) Engaging in activities designed to bring about a withdrawal or secession from the I.B.E.W. of any L.U. or of any member or group of members, or to cause dual unionism or schism within the I.B.E.W.

(5) Engaging in any act or acts which are contrary to the member's responsibility toward the I.B.E.W., or any of its L.U.'s, as an institution, or which interfere with the performance by the I.B.E.W. or a L.U. with its legal or contractual obligations.

(6) Working for, or on behalf of, any employer, employer-supported organization, or other union, or the representatives of any of the foregoing, whose position is adverse or detrimental to the I.B.E.W.

(7) Wronging a member of the I.B.E.W. by any act or acts (other than the expression of views or opinions) causing him physical or economic harm.

(8) Entering or being present at any meeting of a L.U., or its Executive Board, or any committee meeting while intoxicated, or drinking intoxicants in or near any such meeting, or carrying intoxicants into such meeting.

(9) Disturbing the peace or harmony of any L.U. meeting or meeting of its Executive Board, using abusive language, creating or participating in any disturbance, drinking intoxicants, or being intoxicated, in or around the office or headquarters of a L.U.

(10) Making known the business of a L.U., directly or indirectly, to any employer, employer-supported organization, or other union, or to the representatives of any of the foregoing.

(11) Fraudulently receiving or misappropriating any moneys of a L.U., or the I.B.E.W.

(12) Causing or engaging in unauthorized work stoppages or strikes or other violation of the laws and rules of the I.B.E.W. or its L.U.'s.

(13) Wilfully committing fraud in connection with voting for candidates for L.U. office, or for delegates to conventions.

Supreme Court of the United States

No. 85-1924

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

ORDER ALLOWING CERTIORARI. Filed October 6, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

Justice Scalia took no part in the consideration or decision of this petition.

A true copy of
JOSEPH F. SPANIOL, JR.
Test:
Clerk of the Supreme Court
of the United States

By [sig illegible]
Deputy

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483:40501

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1924 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD, PETTITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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25pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that a union violated Section 8(b)(1)(B) of the National Labor Relations Act by disciplining supervisor-members (who represent management in grievance adjustment or collective bargaining) for working for an employer that does not have a collective bargaining agreement with that union.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1924

NATIONAL LABOR RELATIONS BOARD, PETTITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 780 F.2d 1489. The decision and order of the National Labor Relations Board (Pet. App. 9a-37a) are reported at 271 N.L.R.B. 995.

JURISDICTION

The judgment of the court of appeals (Pet. App. 38a) was entered on January 22, 1986. On April 16, 1986, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including May 22, 1986. The petition was filed on May 22, 1986, and granted on October 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B), provides:

> It shall be an unfair labor practice for a labor organization or its agents—

> (1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances[.]

STATEMENT

1. Harold E. Nutter, Inc. (Nutter) and Royal Electric Co. (Royal) are electrical contractors in Sacramento, California. They were represented in collective bargaining by the Sacramento Valley Chapter of the National Electrical Contractors Association, Inc. (NECA), a multiemployer bargaining group. Prior to 1981, NECA had negotiated a series of collective agreements with respondent International Brotherhood of Electrical Workers, Local 340 (the Union). The last of those agreements expired on May 31, 1981, and, when negotiations for a new contract were unsuccessful, the Union struck all NECA members, including Nutter and Royal. Pet. App. 2a, 11a, 12a; J.A. 55-56, 61-62, 64.

The strike lasted for several months. On September 15, 1981, the Union sent NECA a disclaimer of interest in representing the employees of NECA members in "the multi-[employer] bargaining unit previously established," and NECA accepted the disclaimer (Pet. App. 2a, 12a-13a). The Union then filed separate representation petitions seeking to represent, in single-employer units, employees of 17 NECA members. The Union did not file petitions for representation of the employees of either Nutter or Royal. On October 1, 1981, NECA signed a bargaining agreement with a different union, the National Association of Independent Unions (NAIU), and both Nutter and Royal adopted the NAIU agreement. *Id.* at 2a, 13a; J.A. 56, 77-78, 125-127.

During 1982, Ted Choate, a Union member, served as vice-president and estimator for Nutter. Choate's duties included hiring employees from the NAIU hiring hall,

transferring employees from jobsite to jobsite, visiting jobsites, and supervising foremen. One supervisor with specific responsibility to adjust employee grievances reported directly to Choate in the company's management hierarchy. Pet. App. 21a; J.A. 74-75, 83-84, 95-96, 103, 108. Albert Schoux, another Union member, was Royal's superintendent at its Aerojet jobsite. His duties included planning and ordering materials for the job; hiring employees from the NAIU hiring hall; and assigning, transferring and firing employees. Schoux handled and resolved employees' job-related requests and personal problems, such as requests for time off and complaints about particular work assignments. Pet. App. 14a-16a; J.A. 7, 9-10, 14-18, 25, 42-43, 47, 53-55.

In the fall of 1982, internal Union charges were filed against both Choate and Schoux, alleging that they had violated the Union's constitution by working for employers who did not have a collective bargaining agreement with the Union. Choate and Schoux were each found guilty as charged by a separate Union trial board. Choate was fined $6,000 and Schoux was fined a total of $8,200. Pet. App. 3a, 18a, 21a-22a; J.A. 127-128, 137-150, 152.

2. The National Labor Relations Board, adopting the findings and conclusions of the administrative law judge, concluded that the Union violated Section 8(b)(1)(B) of the National Labor Relations Act (the Act), 29 U.S.C. 158(b)(1)(B), by fining Choate and Schoux. The Board found that Choate and Schoux were supervisors who acted as grievance adjustment or collective bargaining representatives for their employers and that, by fining them because they worked for nonsignatory employers, the Union had restrained and coerced Nutter and Royal in the selection and retention of their representatives for those purposes. Pet. App. 28a, 34a. The Board explained that " 'the reasonably foreseeable and intended effect of such discipline is that the supervisor-member will cease

working' " for the non-signatory employer, " 'thereby depriving the employer of the grievance adjustment services of his chosen representative' " (Pet. App. 27a, quoting *Plumbers Local 364,* 254 N.L.R.B. 1123, 1125 (1981)).

The Board rejected the Union's contention, which was based on the Ninth Circuit's decision in *NLRB* v. *IBEW, Local 73 (Chewelah Contractors, Inc.)*, 714 F.2d 870 (1980) (*Chewelah*), that Section 8(b)(1)(B) could not have been violated because the Union did not have or intend to establish a collective bargaining relationship with Nutter or Royal at the time it fined Choate and Schoux. The Board held that *Chewelah* was inconsistent with this Court's decision in *American Broadcasting Cos.* v. *Writers Guild,* 437 U.S. 411 (1978) (*ABC*). The Board explained that, in *ABC,* this Court found that discipline imposed on grievance-handling supervisors who crossed union picket lines violated Section 8(b)(1)(B) even though the supervisors did not supervise or adjust grievances of the striking employees, but only supervised or adjusted grievances of employees whom the striking union did not represent or desire to represent. The Board stated that, although the union in *ABC* did represent other employees of the complaining employer, and thus did have a bargaining relationship with the employer, the Court had made clear in *ABC* that its rationale applied equally to situations in which the union did not represent any employees of the complaining employer. Pet. App. 30a-31a (citing *Plumbers Local 364,* 254 N.L.R.B. at 1126-1127).

The Board also concluded that, even under the Ninth Circuit's *Chewelah* decision, the Union violated Section 8(b)(1)(B) because in fact one of the purposes of the fines was to pressure Nutter and Royal ultimately to sign collective bargaining agreements with the Union. The Board found that the fines were intended to "force the employers out of the NECA multiemployer bargaining and into

bargaining on a single employer * * * or new association basis," and it noted that "[a] union's attempt to force an employer to resign from a multiemployer bargaining association was recognized as an 8(b)(1)(B) violation by the Court in *Chewelah*" (Pet. App. 33a-34a).[1]

The Board ordered the Union, *inter alia,* to rescind the fines levied against Choate and Schoux, to expunge from its records the disciplinary action taken against them, and to post appropriate notices (Pet. App. 35a-36a).

3. The court of appeals denied enforcement of the Board's order. The court upheld the Board's findings that Choate and Schoux were supervisors and representatives of their employers for the purpose of grievance adjustment or collective bargaining (Pet. App. 4a-5a), and the court recognized that "[f]ines imposed on representatives may constitute prohibited coercion because the effect of the discipline may be to deprive an employer of the ser-

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[1] In another case arising out of the same labor dispute between the Union and members of NECA—*IBEW, Local 340 (Hulse Electric)*, 273 N.L.R.B. 428 (1984)—the Board found that the Union had violated Section 8(b)(1)(B) by fining supervisors working for six other nonsignatory NECA employers, even though the Union had disclaimed interest in dealing with those employers in the multiemployer bargaining unit. In *Hulse,* the Union had filed individual representation petitions with respect to two of the employers but, as with Nutter and Royal in this case, it made no immediate efforts to organize or bargain with the other four employers. As here, the Board in *Hulse* found the absence of a union representation petition to be irrelevant to the violation; whether or not the Union filed such a petition, the effect of the Union's discipline was to deprive the employer of the services of its chosen representatives. The Board also found, as it did here, that the discipline was unlawful even under the Ninth Circuit's *Chewelah* standard because the evidence showed that, even if the Union had not filed a representation petition against a particular employer, the Union intended to withhold supervisors from NECA employers in order to force the employers to "come back to [the Union]" on "a single employer basis." 273 N.L.R.B. at 442.

vices of his representative" (*ibid.*). The court ruled, however, that its prior decision in "*Chewelah* controls and is dispositive of the issue in this case" (*id.* at 6a).

In *Chewelah,* the Ninth Circuit had ruled that even though a union fined a member-supervisor with grievance-handling responsiblitity for working for a nonunion employer (Chewelah), there was no Section 8(b)(1)(B) violation because the union neither represented nor sought to represent Chewelah's employees and therefore "had no incentive to either influence Chewelah's choice of bargaining representative or affect [the disciplined supervisor's] loyalty to Chewelah." 714 F.2d at 871. Applying these principles to this case, the court held that "when a union does not represent or intend to represent the complaining company's employees there can be no Section 8(b)(1)(B) violation when a union disciplines members even if they are designated bargaining representatives" (Pet. App. 5a).

The court also rejected the Board's contention that there was a violation even under *Chewelah* because the Union in this case had in fact demonstrated an interest in representing Nutter's and Royal's employees. The court held that "where a Union has filed a disclaimer of interest, and has made no subsequent organizing efforts, its discipline of members fully a year after the termination of the bargaining relationship between the Union and the employers cannot reasonably be construed as an effort to restrain or coerce the employer" (Pet. App. 7a). The court added that, in order to establish a violation of Section 8(b)(1)(B), it would require more than "a generalized desire to bargain" and would "require some evidence of specific overt acts such as picketing, handbilling, making statements of interest to the employers, or passing out * * * cards to find a desire to represent * * * particular employees" (Pet. App. 7a).

SUMMARY OF ARGUMENT

1. Section 8(b)(1)(B) of the National Labor Relations Act makes it an unfair labor practice for a union to "restrain or coerce" an employer in selecting collective bargaining or grievance adjustment representatives. The section was enacted in 1947 as part of the Taft-Hartley package of amendments; its purpose was to assure employers that there would be no coercion by unions in the selection of their collective bargaining and grievance adjustment representatives. Both the statutory language and the legislative history show that Section 8(b)(1)(B) is concerned with the effect or potential effect on the employer. Accordingly, the decisions of the Board and this Court have recognized that the test for a violation of Section 8(b)(1)(B) is whether union conduct (in this case the discipline of a supervisor-member) "may adversely affect" the member's performance of grievance adjustment or collective bargaining tasks on behalf of his employer. *Florida Power & Light Co.* v. *IBEW, Local 641,* 417 U.S. 790, 804-805 (1974); *ABC,* 437 U.S. at 425.

2. The Ninth Circuit improperly focused on the union's motivation rather than on the impact on the employer. It acknowledged that the fines imposed on grievance handling or collective bargaining representatives "may constitute prohibited coercion because the effect * * * may be to deprive an employer of the services of his representative" (Pet. App. 4a, 5a). Under this Court's decisions, the determination that such an effect may occur should be the end of the matter. But the Ninth Circuit ruled that union action having such an effect does not violate Section 8(b)(1)(B) when the "union does not represent or intend to represent the complaining company's employees" (Pet. App. 5a, citing *Chewelah,* 714 F.2d at 871). By engrafting onto the statute a requirement that does not appear in its language, the court below has deprived employers of part

of the freedom that Congress intended to assure them to select representatives for grievance adjustment or collective bargaining free of union coercion or restraint.

3. If the language and legislative history of the statute left any doubt about whether the impact on the employer, rather than the union's motivation, is dispositive, the court below should have deferred to the reasonable construction placed on the statute by the Board, the agency charged with administering and enforcing the Act.

ARGUMENT

THE BOARD REASONABLY CONCLUDED THAT A UNION VIOLATES SECTION 8(b)(1)(B) OF THE NATIONAL LABOR RELATIONS ACT BY DISCIPLINING SUPERVISOR-MEMBERS, WHO REPRESENT MANAGEMENT IN GRIEVANCE ADJUSTMENT OR COLLECTIVE BARGAINING, FOR WORKING FOR AN EMPLOYER THAT DOES NOT HAVE A COLLECTIVE BARGAINING AGREEMENT WITH THE UNION

A. Section 8(b)(1)(B) Prohibits Union Discipline Of Supervisor-Members That May Adversely Affect Their Willingness To Serve As Grievance Adjusters Or Collective Bargainers On Behalf Of An Employer

1. Section 8(b)(1)(B) of the Act, 29 U.S.C. 158(b)(1)(B), makes it "an unfair labor practice for a labor organization * * * to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The evident purpose of the statute is to free employers from restraint or coercion by unions in the choice of representatives for collective bargaining or grievance adjustment.

Section 8(b)(1)(B) was one of several provisions added to the Act in 1947 to clarify the relationship between employers and supervisory employees in the wake of this Court's decision in *Packard Motor Car Co.* v. *NLRB*, 330

U.S. 485 (1947).[2] In addition to Section 8(b)(1)(B), Congress enacted Section 2(3), 29 U.S.C. 152(3), which excludes supervisors (as defined in Section 2(11), 29 U.S.C. 152(11)) from the definition of "employee," thereby denying to supervisors the protections of the Act. Congress also enacted Section 14(a), 29 U.S.C. 164(a), which provides that, while supervisors are not prohibited from becoming or remaining union members, employers are not required to treat them as employees for purposes of collective bargaining. The dissenters in *Packard* had viewed foremen as constituting "the arms and legs of management in executing labor policies" (330 U.S. at 496), and those in Congress who favored passage of the 1947 amendments believed, in the words of Senator Taft, that "[f]oremen are part of management" (93 Cong. Rec. 3836 (1947)). See also 93 Cong. Rec. 5014 (1947)(remarks of Senator Ball). Because foremen—and supervisors generally—play a key role in the dealings between management and rank-and-file, it is essential, the Senate Report stated, that employers be assured of the "undivided loyalty" of their supervisors. S. Rep. 105, 80th Cong. 1st Sess. Pt. 1, at 5 (1947).

In addition to that effort to protect employers against the effects of such conflicting loyalties, Congress enacted the specific protection embodied in Section 8(b)(1)(B): that employers be free of "union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment" (*Florida Power,* 417 U.S. at 803). See S. Rep. 105, *supra,* at 21 (the statute was intended to prohibit unions from compelling "the removal of a * * * supervisor who has been delegated the function

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[2] In *Packard,* the Court upheld a Board determination that certain foremen were "employees" under the Wagner Act, ch. 372, § 2(3), 49 Stat. 449, and constituted an appropriate unit for collective bargaining purposes.

of settling grievances"); 93 Cong. Rec. 3837 (1947) (remarks of Senator Taft) ("Under this provision it would be impossible for a union to say to a company, 'We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' Under the bill the employer has a right to say 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with' "); *ibid.* (remarks of Senator Taft) ("employees cannot say to their employer. 'we do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones and therefore you will have to fire him, or we will not go to work"); 93 Cong. Rec. 4143 (1947) (remarks of Senator Ellender) ("The bill * * * makes it an unfair labor practice for a union to attempt to coerce an employer either in the selection of his bargaining representative or in the selection of a personnel director or foreman, or other supervisory official. * * * [Q]uite a few unions forced employers to change foremen. * * * This amendment seeks to prescribe a remedy in order to prevent such interferences").

2. Consistent with the language and purpose of Section 8(b)(1)(B), the Board has focused, in interpreting the section, on the potential impact of union conduct on employers.[3] This Court has approved that approach, en-

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[3] The Board initially construed Section 8(b)(1)(B) to prohibit only direct union pressure designed to compel an employer to replace its chosen representative. In *San Francisco-Oakland Mailers Union No. 18 (Northwest Publications, Inc.)*, 172 N.L.R.B. 2173 (1968), the Board construed the statute also to prohibit union fines directed against supervisor-members for the manner in which they assigned work under an existing collective bargaining agreement between the union and the employer. The Board found in *Oakland Mailers* that, although the union "sought the substitution of attitudes rather than persons, and may have exerted its pressures upon the [employer] by in-

dorsing the Board's view that Section 8(b)(1)(B) prohibits not only a union's direct economic pressure on an employer to replace its chosen collective bargaining or grievance adjustment representative, but also "a union's discipline of one of its members who is a supervisory employee * * * when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." *Florida Power,* 417 U.S. at 804-805; *ABC,* 437 U.S. at 424.

In *ABC,* as in this case, the union membership included persons employed in supervisory positions. The supervisor-members (referred to by the Court as "hyphenates") performed duties involving collective bargaining or grievance adjustment on behalf of the employer. The Court held that the union violated Section 8(b)(1)(B) by imposing fines on the hyphenates for performing their regular supervisory duties during a strike. In so holding, the Court agreed with the Board that "as to those hyphenates whom the union kept from work, the employer was restrained and coerced within the meaning of § 8(b)(1)(B) by being totally deprived of the opportunity to choose these particular supervisors as his collective-bargaining or grievance-adjustment representatives during the strike"; and as to those hyphenates who reported for work and were disciplined for performing only their normal supervisory functions, it was probable that the union discipline would diminish their capacity "to carry out their

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direct rather than direct means," the pressure ultimately interfered with the employer's control over its representatives. "Realistically, the Employer would have to replace its foremen or face *de facto* nonrepresentation by them." *Oakland Mailers,* 172 N.L.R.B. at 2173. See *Florida Power,* 417 U.S. at 798-800; *ABC,* 437 U.S. at 422-423.

grievance-adjustment duties effectively" in the future and thus the employer would be forced to replace them (437 U.S. at 432, 434-435).[4]

In sum, *ABC* makes clear that "[u]nion pressure on supervisors can affect either their willingness to serve as grievance adjustors or collective bargainers, or the manner in which they fulfill these functions; and either effect impermissibly coerces the employer in his choice of representative" (437 U.S. at 436).

3. In the present case it is undisputed, and the court below found, that Choate and Schoux were authorized to perform grievance adjustment and collective bargaining tasks in the course of their supervisory duties (see pages 2-3, 5 *supra*). It is also beyond dispute that the Union fined the supervisors in order to induce them to cease working for employers with which the Union did not have a contract.[5] In these circumstances, the union discipline would be likely to affect the supervisors' "willingness to serve as grievance adjustors or collective bargainers" (*ABC*, 437 U.S. at 436) for employers disfavored by the Union. The situation is virtually identical to that in *New Mexico District Council of Carpenters (A.S. Horner, Inc.)*, 177

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[4] The Court distinguished *ABC* from the facts in *Florida Power*, where the union had disciplined supervisor-members who performed only rank-and-file work during a strike. Unlike this case and *ABC*, where the supervisor-members performed their normal supervisory functions, *Florida Power* involved union discipline that merely deprived the employer of services normally rendered by replacement employees and would not tend adversely to affect the supervisor's ability or willingness to perform Section 8(b)(1)(B) functions. 437 U.S. at 429-430, 434-435 n.34.

[5] Although one of the Union's defenses at the hearing before the administrative law judge was that the discipline was directed at the performance of rank-and-file work, the ALJ's decision, as well as the decisions of the Board and the court of appeals, recognized that the Union fines were imposed because the supervisor-members worked for firms that had no contract with the Union (Pet. App. 3a, 14a).

N.L.R.B. 500 (1969), enforced, 454 F.2d 1116 (10th Cir. 1972), in which the union fined a supervisor-member with grievance handling functions because he worked for an employer that did not have a contract with the union. The Board found in *A.S. Horner* that the union was effectively "using its internal working rules to boycott an employer" who had no contract with it (177 N.L.R.B. at 502). In *ABC,* this Court cited that aspect of *A.S. Horner* with approval, stating that "[a] fine imposed in these circumstances violated the section [8(b)(1)(B)] because compliance by the supervisor with the union's demands would have required his leaving his job and thus have 'the effect of depriving the Company of the services of its selected representative for the purpose of collective-bargaining or the adjustment of grievances.' " 437 U.S. at 436 n.36 (quoting *A.S. Horner,* 177 N.L.R.B. at 502). Indeed, this Court noted that the prohibition of union discipline in *A.S. Horner* fell " 'close to the original rationale of Section 8(b)(1)(B)[,] which was to permit the employer to keep the bargaining representative of his own choosing.' " *ABC,* 437 U.S. at 436 n.36 (quoting *IBEW, Local 134* v. *NLRB,* 487 F.2d 1143, 1155 n.19 (D.C. Cir.), cert. denied, 418 U.S. 1143 (1973)); see also pages 9-10 & note 3, *supra.*

B. The View Of The Court Below That Union Discipline Of A Supervisor-Member Violates Section 8(b)(1)(B) Only When The Union Represents Or Demonstrates A Specific Intent To Represent The Affected Employer's Employees Is Inconsistent With This Court's Decision In *ABC* And Is An Unwarranted Limitation On The Protection Congress Afforded To Employers

The court of appeals acknowledged that the effect of respondent's discipline in this case "may be to deprive an employer of the services of his representative" (Pet. App. 5a). Under this Court's decision in *ABC* that conclusion

should have ended the case.[6] Instead, as it had in *Chewelah,* the court below focused on the union's asserted motive for disciplining the union member, rather than on the effects of the discipline on the union member's employer. In *Chewelah,* the court had held that union discipline of a supervisor-member for working for a nonunion employer did not violate Section 8(b)(1)(B) because the union had "no incentive to either influence [the employer's] choice of bargaining representatives or affect [the employee's] loyalty to his employer."[7] 714 F.2d at 871. In the present case, the court continued further along the same path. It first stated that, "[t]he central question is whether the union demonstrated an intent to represent the employees of the nonsignatory employers" (Pet. App. 6a). It then rejected the Board's finding that the Union did have a representational interest, stating (Pet. App. 7a) that a "generalized desire to bargain" would not suffice; instead, it placed on the Board the burden of proving a clear interest in representing "particular employees," evidenced

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[6] The Eleventh Circuit so recognized in *NLRB* v. *IBEW Local Union No. 323,* 703 F.2d 501, cert. denied, 464 U.S. 950 (1983), in upholding the Board's finding that a union violated Section 8(b)(1)(B) by fining a supervisor-member with grievance-handling responsibilities because he worked for a nonunion employer. The court stated that since the supervisor "was fined for his affiliation with a nonunion company, 'compliance * * * with the union's demands would have the effect of depriving the Company of the services of its selected representative' " in violation of the Act. 703 F.2d at 505 (quoting *ABC,* 437 U.S. at 436 n.36).

[7] The emphasis on the union's representational intent was underscored when, on the Board's petition for rehearing, the court in *Chewelah* amended its opinion to add that "[t]he case may be different if there is evidence that the union's actual purpose in enforcing its bylaw was to interfere with the employer's selection." 714 F.2d at 871-872.

by "specific overt acts such as picketing, handbilling, making statements of interest to the employers, or passing out * * * cards" (*ibid.*).[8]

The approach taken by the court below would engraft onto the statute a limitation not intended by Congress. As the language of the statute shows, where Congress sought to limit the scope of the legislation it did so expressly. For example, Section 8(b)(3), 29 U.S.C. 158(b)(3), makes it an unfair labor practice for a union to refuse to bargain collectively with an employer "provided it is the representative of [the employer's] employees." Congress was thus fully capable of inserting such provisos or limitations where it wished to do so. The provision at issue in this case has no such restriction: the congressional solution to the bargaining-representative/grievance-adjuster problem in the wake of *Packard* was to protect management's choice of such personnel from *union* coercion generally, not merely from interference by unions with whom the employer currently has a relationship.

Lacking any support in the words of the statute, the decision below apparently rests on the premise that the concerns underlying Section 8(b)(1)(B) relate to "the integrity of the collective-bargaining process" and that those concerns are implicated only " 'when the union charged with influencing an employer's choice of bargaining representatives is the bargaining representative of that employer's employees' " (Br. in Opp. 3, quoting *Chewelah*, 621 F.2d at 1036). But neither the language nor the legislative history of Section 8(b)(1)(B) (see pages 8-10, *supra*) supports the view that Congress intended to protect an employer only from coercion by a union that has or seeks to have a collective bargaining relationship with the

[8] Respondent recasts this standard (Br. in Opp. 2) to say that Section 8(b)(1)(B) proscribes union discipline of supervisor-members with grievance-handling or collective-bargaining responsibilities only if the union "is engaged with the employer in the collective bargaining process."

employer. Rather, as *ABC* teaches, Section 8(b)(1)(B) may be violated by any union sanctions on supervisors that "may adversely affect" either a supervisor's actual performance of collective bargaining or grievance adjustment tasks, or his willingness to serve in that capacity (437 U.S. at 430, 436). The unlawful effect is no less clear where the union seeks to prevent a supervisor-member from working for an employer with which the union has no relationship than it is where the union seeks to affect the supervisor-member's actual performance of collective bargaining or grievance adjustment tasks. In the former case, "compliance by the supervisor with the union's demands would have required his leaving his job," thereby directly depriving the employer of his chosen representative (*ABC*, 437 U.S. at 436 n.36, citing *A.S. Horner, supra*); in the latter case, such compliance requires the employer, in order "to insure having satisfactory collective-bargaining and grievance-adjustment services," to make "a change in his representative" (*ABC*, 437 U.S. at 435).

In *ABC* itself, this Court rejected any requirement that the union show a specific intent to represent particular employees or to affect the performance of a supervisor's grievance adjustment or collective bargaining duties with respect to the employees who are represented by the offending union. There, the union (which represented writers in the film industry) disciplined directors, as well as other supervisor-members, for working during a writers' strike. The directors neither supervised writers nor adjusted their grievances, and the union had no interest in representing those employees whom directors did supervise and who were represented by a separate union. As does respondent here (Br. in Opp. 2), the union in *ABC* contended that the lack of such a representational nexus exempted its disciplinary action from Section 8(b)(1)(B). The Court, however, noting that the union's discipline would make the supervisor-members less willing to continue

serving their employer in that capacity, concluded that a "union may no more interfere with the employer's choice of grievance representative with respect to employees represented by other unions than with respect to those employees whom it itself represents." *ABC*, 437 U.S. at 437-438 n.37.[9]

In this case the employers had a bargaining relationship with a union other than respondent (page 2, *supra*), and the effect of respondent's discipline was to coerce the employers in the selection of their representatives in that relationship. But that does not make the coercion any less a violation of Section 8(b)(1)(B); indeed, in *A.S. Horner, supra,* which was cited with approval by this Court in *ABC*, the Board found that even if the employer did not have a collective bargaining relationship with any union, a union would violate Section 8(b)(1)(B) if its discipline of a supervisor-member with grievance-adjustment responsibilities had the effect of depriving the employer of his services.[10] The purpose of Section 8(b)(1)(B) is not solely to prohibit a union from coercing employers in selecting personnel to deal with that union and the employees it represents, but to prohibit unions from coercing an employer with respect to the selection of its labor relations personnel generally.

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[9] The Court cited *International Organization of Masters*, 197 N.L.R.B. 400 (1972), enforced, 486 F.2d 1271, 1274 (D.C. Cir. 1973), cert. denied, 416 U.S. 956 (1974); and *International Organization of Masters* v. *NLRB*, 539 F.2d 554, 559-560 (5th Cir. 1976), cert. denied, 434 U.S. 828 (1978). In those cases the union was found to have violated Section 8(b)(1)(B) by picketing an employer to force it to replace grievance adjusters who were members of another union with adjusters who were members of the picketing union.

[10] Although, as respondent notes (Br. in Opp. 8 n.2), the union in *A.S. Horner* had lost a Board-conducted election several months earlier, the Board's rationale in that case, which was approved by the Tenth Circuit, did not turn on that fact but rather on the circumstance

As the Eleventh Circuit concluded in *NLRB* v. *IBEW Local Union No. 323,* 703 F.2d at 507: "Placing the emphasis on the effect caused by the union's actions, rather than its intent, is more consistent with the fundamental purpose of the statute." Congress' overriding concern in enacting Section 8(b)(1)(B) was to insulate an employer's *selection* of his collective bargaining or grievance adjustment representatives from union influence or interference. See *Florida Power,* 417 U.S. 803; see also pages 9-10, *supra.* An attempt to force a supervisor-member to cease working for a "nonunion" company demonstrably infringes on the employer's right to choose that person as its representative. "In view of that inevitable result, even a union endeavoring only to enforce an internal regulation, * * * can deprive the employer of the protection afforded by the statute." *NLRB* v. *IBEW Local Union No. 323,* 703 F.2d at 507. In short, whether the supervisor-member was fined for working for a "nonunion" employer (as here and in *A.S. Horner),* or for a struck employer (as in *ABC*), the employer has been deprived of its "unrestrained freedom to select a grievance-adjustment and collective bargaining representative." *ABC,* 437 U.S. at 430.[11]

The court below also erred in rejecting the Board's determination that the Union did, in fact, have a sufficient

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that compliance by the supervisor with the union's demands would have had the effect of depriving the employer of the services of its selected representatives for the purposes of collective bargaining or the adjustment of grievances. See also *NLRB* v. *IBEW, Local Union No. 323,* 703 F.2d at 505.

[11] The Court's opinion in *ABC* also effectively disposes of the Ninth Circuit's comment in *Chewelah,* 714 F.2d at 871, that, because a supervisor-member may avoid discipline by resigning from the union, such discipline does not constitute restraint or coercion under Section 8(b)(1)(B). As this Court explained (*ABC,* 437 U.S. at 437), "this submission is simply another argument that union sanctions applied to supervisor-members * * * can never violate § 8(b)(1)(B)," a position that the Court rejected in both *Florida Power* and *ABC.*

representational interest to trigger the prohibitions of Section 8(b)(1)(B), even under the *Chewelah* standard. Although the Board, seeking to apply the *Chewelah* standard, found that the union was motivated by a desire to force NECA members out of the multiemployer unit and into single-employer bargaining units, the court rejected that finding. The indicia of union interest the court now states it will require (*e.g.*, picketing, handbilling, etc. (Pet. App. 7a)) would, in the Board's judgment, immunize coercion of decisions protected by Section 8(b)(1)(B) where such coercion occurs in the context of an ongoing struggle between an employer and the union which may not presently involve an effort to organize or to seek recognition as the employees' representative.[12] Even in the context of an organizing campaign, under the test utilized by the court below, a union that disciplined supervisor-members as the first step in such a campaign could do so with impunity (because it had not yet engaged in steps the court would regard as evidencing a representational interest).

C. The Board's Decision Is A Reasonable Construction Of The Statutory Language And Is Entitled To Deference

Interpretation of Section 8(b)(1)(B) calls for an exercise of the " 'difficult and delicate responsibility' " " 'of striking [the] balance to effectuate national labor policy * * *, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *ABC*, 437 U.S. at 431 (quoting *NLRB* v. *Iron Workers, Local Union No. 103*, 434 U.S. 335, 350 (1978)). In answering the question whether a union commits an unfair labor practice by disciplining its supervisor-members for working for a nonunion employer, the Board is engaged in its "special function of applying the general provisions of

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[12] Indeed, the record in this case shows that even after Nutter signed the NAIU agreement, the Union engaged in informational picketing at one of Nutter's jobsites (J.A. 79, 85 133, 136).

the Act to the complexities of industrial life." *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963), citing *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 798 (1945), and *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941).

The relationship between employers and supervisory employees who maintain union membership is a complex one that calls for discerning scrutiny in Section 8(b)(1)(B) cases. In craft unions, such as respondent, members may serve as supervisors on one jobsite and journeymen on another. Or, as in *ABC*, union members may serve their employers in several capacities simultaneously. Such employees may find it important, while performing supervisory grievance adjustment or collective bargaining functions on behalf of management, to maintain their union membership and to preserve the benefits and vested economic rights such membership may provide.

In this case, the Board examined the complexities of the particular facts and reasonably applied the principles set forth in *ABC*. The Board concluded that the union disciplinary actions restrained the employers in their choice of representatives for Section 8(b)(1)(B) purposes and thus violated that provision regardless of the union's motives or the nature of its relationship with the employers. That conclusion "represents an 'acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory section[].' " *ABC*, 437 U.S. at 430 (quoting *Iron Workers*, 434 U.S. at 341). By substituting its judgment for that of the Board, the court of appeals impermissibly intruded on the Board's primary responsibility in an area of the Board's expertise.[13]

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[13] The court of appeals also erred in failing to accord greater deference to the Board's finding that the union did have "reasons to influence the employer's choice of bargaining representatives and to affect the supervisors' loyalty to their employers" (Pet. App. 33a). As the Board stated, the Union "intended to bargain with a new associa-

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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tion comprised of the[] 17 [NECA] employers [as to whom representation petitions had been filed]. Thereafter, [the Union] desired to have the other employers join the new association" (*ibid.*). See *id.* at 24a-25a. This finding, which is supported by substantial evidence, must be treated as conclusive. 29 U.S.C. 160(e); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

The Board's finding also serves to illustrate that this case falls clearly within the category of conduct Section 8(b)(1)(B) was intended to proscribe. As this Court stated in *Florida Power*, 417 U.S. at 803 (footnote omitted), "[t]he specific concern of Congress was to prevent unions from trying to force employers into or out of multi-employer bargaining units."

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40086

(1)

Supreme Court, U.S.
FILED
DEC 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1924

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 340,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT

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IN THE

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BRIEF OF RESPONDENT

The citations to the opinions below and the basis for this Court's jurisdiction are correctly set forth in petitioner's brief at p. 1. In addition to the statutory provision quoted in that brief, the following additional provisions of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 *et seq.*, are pertinent here:

Section 2, 29 U.S.C. § 152. Definitions

When used in this subchapter—

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained

any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 14(a), 29 U.S.C. § 164(a). Construction of Provisions

(a) Supervisors as union members

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

STATEMENT OF FACTS

The International Brotherhood of Electrical Workers Local 340 ("Local 340" or "the Union"), represents electricians in an area that includes Sacramento, California. Pet. App. 2a, 11a-12a. For many years prior to 1981, Local 340 had negotiated a series of collective bargaining

agreements with the Sacramento Chapter of the National Electrical Contractors Association, Inc. (NECA), a multi-employer bargaining unit. (*Id.*) Harold E. Nutter, Inc. ("Nutter") and Royal Electric Co. ("Royal"), electrical contractors in Sacramento, were represented by NECA. *Id.*

In September, 1981, in the course of a labor dispute between NECA and Local 340, the Union disclaimed interest in representing the employees of NECA members in "the multi-[employer] bargaining unit previously established." Pet. App. 2a, 12-13a. The following day, NECA adopted the disclaimer, causing the multi-employer unit to be "dissolved" (as the Board has found in a related case, *Arden Electric*, 275 NLRB No. 95 (June 4, 1985)). Shortly thereafter, the Union filed separate representation petitions seeking to represent, in single-employer units, the employees of those employers that had been in the NECA bargaining unit and whose employees the Union believed desired representation by Local 340. J.A. 126. Local 340 did not then or subsequently file petitions to represent the employees of Royal or Nutter, and since September, 1981, Local 340 has played no part in negotiating the terms and conditions of employment for employees of those two employers. Pet. App. 2a, 12a-13a; J.A. 55-57, 77-79.

On October 1, 1981, NECA signed a labor agreement with an "independent" union, the National Association of Independent Unions, Pet. App. 2a, 13a, which operated, at least in part, out of the same building as NECA, J.A. 59. Both Nutter and Royal immediately adopted that contract, Pet. App. 2a, 13a, which provided for electricians to be paid wages below the level established in Local 340's collective bargaining agreements with other employers. J.A. 82, 136.

Under the Constitution of the International Brotherhood of Electrical Workers ("IBEW"), the international union which is the parent of Local 340, IBEW members

are not to "work[] for, or on behalf of, any employer . . . whose position is adverse or detrimental to the IBEW." J.A. 152. By paying wages below union scale, Royal and Nutter assumed a position "adverse or detrimental to the IBEW"; indeed, some time after January 1982, Local 340 picketed one of Nutter's jobsites for several days because Nutter was undermining the union's scale by paying sub-standard wages. J.A. 72, 79. The picketing was "normal area standards picketing." J.A. 133, 136.

In March, 1982, a member of Local 340 filed a charge with the Local against a fellow member, Marvin Miller, alleging that Miller was working for Nutter. On November 1, 1982, the Local's business manager filed a similar charge against union member Ted Choate. And on December 20, 1982, a third union member filed a charge against Albert Schoux, a member of a sister local of the Union, alleging that Schoux was working for Royal, another employer with which the Union did not have a bargaining relationship. Pet. App. 2a-3a, 14a, 17a-18a, 20a-22a.

Following notices to Miller, Choate and Schoux, trial boards established by the Union held a hearing in each case. Based on the evidence presented at these hearings, the trial boards found the individuals in question guilty, *inter alia*, of violating the constitutional prohibition on working for adverse employers. A fine was imposed on each individual. Pet. App 2a-3a, 18a, 21a, 22a.

After the fines were assessed, Nutter and Royal filed unfair labor practice charges against Local 340, alleging that by fining individuals who worked for those employers, the Union had restrained or coerced the employers in the selection of their representatives in violation of § 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B) ("NLRA" or "the Act"). An Administrative Law Judge of the National Labor Relations Board ("NLRB" or "the Board") found the fines of Choate and Schoux to be unlawful on the theory that those fines would have " 'the reasonably forseeable and

intended effect' " of causing those individuals to resign their supervisory posts. Pet. App. 27a. The ALJ sustained the fine of Miller, however, because, although Miller ordinarily served as one of Nutter's foremen, Miller worked as a journeyman electrician on the particular job at which Miller had been seen working by a fellow union member and for which Miller was fined. The ALJ concluded that disciplining Miller for working on that job did not "restrain or coerce Nutter Electric in its selection or retention of supervisors." Pet. App. 29a.

All parties filed exceptions to the ALJ's decision. On August 14, 1984, the Board, without opinion, "affirm[ed] the judge's rulings, findings conclusions." Pet. App. 9a.

The Board petitioned the United States Court of Appeals for the Ninth Circuit to enforce its order. On January 22, 1986, that court denied enforcement, ruling that because Local 340 did not have a collective bargaining relationship with Royal or Nutter and was not seeking to organize those employers' employees, the Local's conduct in fining union members for working for those employers "cannot reasonably be construed as an effort to restrain or coerce the employers." Pet. App. 7a.

On October 6, 1986, this Court granted the Board's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The theory on which the Board's decision in this case rests is that § 8(b)(1)(B) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(1)(B), not only prohibits a union from disciplining a union member who serves as a management representative for the individual's conduct *qua* management representative but also prohibits union discipline whose purpose and effect is to discourage union members from accepting management positions. The implications of this theory are far-reaching. As the instant case illustrates, the Board's understanding of § 8(b)(1)(B) prohibits a union from en-

forcing as against supervisor-members union rules requiring members to work only for employers who pay the union's collectively negotiated wage scale. And the logic of the Board's theory would make it equally unlawful for a union to limit its membership to rank-and-file workers and to exclude all supervisors from membership. PP. 7-12 *infra*.

The Board bases its theory almost entirely on this Court's decision in *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411 (1978) ("*ABC*"). There is language in that case which can be read to establish an independent rule that any union discipline which affects union members' "willingness to serve" as management's representatives violates § 8(b)(1)(B). But that language was written in a case in which a union, having allowed its members to assume a supervisory status, sought to use the supervisors' union membership as a handle to control the supervisors' conduct as management's representative. Against that background *ABC*, fairly read, goes no further than to suggest that § 8(b)(1)(B) proscribes union action which interferes with the employer's control over his representative and *thereby* affects the representative's "willingness to serve." The NLRB itself has so understood *ABC* in some of its decisions. Pp. 12-17 *infra*.

The legislative history of the statute leaves no doubt that the narrower reading of *ABC* better reflects Congress' intent. Although Congress did not focus specifically on and reject in terms the theory the Board here seeks to extract from *ABC*, the legislative materials make clear that § 8(b)(1)(B) was intended, understood, and defended as a narrow prohibition addressing precisely defined evils far removed from the type of union conduct at issue here. Indeed, as we show, by a full review of the 1947 Congress' actions and deliberations in amending the labor law, the Board's attempt to stretch § 8(b)(1)(B) to cover the instant case ignores the political context in which that section was enacted, and the "gamut of values current" at that time. PP. 18-36 *infra*.

ARGUMENT

SECTION 8(b)(1)(B) OF THE NLRA DOES NOT PROHIBIT A UNION FROM DISCIPLINING A UNION MEMBER FOR TAKING A SUPERVISORY POSITION IN VIOLATION OF THE UNION'S CONSTITUTION

A. Threshold Considerations

The Constitution of the International Brotherhood of Electrical Workers—like that of many other unions, *see* n.3 *infra*—has for many years, prohibited members of the Union from "working for, or on behalf of, any employer . . . whose position is adverse or detrimental to the IBEW." In the instant case, the Union sought to enforce that rule by disciplining three members who had accepted jobs with non-union employers.[1] The Board here contends that although the Union is free to discipline the one member who accepted a non-supervisory job, § 8(b)(1)(B) of the NLRA makes it unlawful for the Union to discipline the two members who happened to accept supervisory positions with grievance adjustment responsibilities.

In making that argument the Board does not contend that the Union in this case placed economic pressure on the employers in an effort "to dictate . . . who would represent them in collective bargaining or grievance adjustment." *Florida Power & Light Co. v. Electrical Workers*, 417 U.S. 790, 803 (1974) ("*FP&L*"). Nor does the Board claim that the Union's conduct "would or might adversely affect the performance of the [supervisor-members'] grievance-adjustment duties" or "interfere with the employer's control over his representative." *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, 432, 433 (1978) ("*ABC*"). Rather the Board's theory is that

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[1] We use the term "non-union employers" to refer to employers whose employees are unrepresented by any union and employers who do not have a collective-bargaining relationship with the union imposing the discipline.

the Union's action has "the reasonably foreseeable and intended effect" of reducing the supply of workers available for supervisory positions and in that sense "restrain[s] or coerce[s]" the employer in filling such positions. *See* Pet. App. 27a; NLRB Br. at 3-4, 13-14. It is our submission, *per contra*, that § 8(b)(1)(B) cannot be stretched so far as to prohibit all union conduct which affects the size of the pool from which an employer chooses his supervisors, especially union conduct aimed at preventing union members from working for an employer with whom the union does not have a collective bargaining relationship.[2]

1. It is helpful at the outset to observe the sweeping implications of the Board's theory. As this case makes clear, the Board's understanding of § 8(b)(1)(B), prohibits a union from enforcing as against supervisor-mem-

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[2] Unlike the court below, we do not believe that a union's right to discipline union members for accepting a supervisory position is limited to instances in which the member is working for an employer with whom the union does not have a bargaining relationship *and* as to whom the union has not engaged in "overt acts" manifesting the union's "desire to represent" the employees of that employer. *Compare* Pet. App. 7a.

We do agree with the view of the court of appeals that this case does not raise any issue concerning the application of § 8(b)(1)(B) with respect to union discipline of supervisor-members employed by employers with whom the union *does have* a collective-bargaining relationship. Indeed, all that is necessary to affirm the judgment of the court of appeals denying enforcement of the Board's order in the present case is a holding that whatever § 8(b)(1)(B)'s significance where a union and employer have a collective-bargaining relationship, the section does not prohibit a union from requiring its members to refrain from working for non-union employers. As we show below, the legislative history establishes at least this much.

For the reasons set forth *infra*, however, we suggest that the soundest basis for affirming the decision below is by distinguishing union discipline aimed at preventing union members from accepting management positions from union discipline aimed at controlling the manner in which union members represent management, and by holding the former to be outside the reach of § 8(b)(1)(B).

bers union rules requiring members to work only for employers paying the union's collectively-negotiated wage scale. Such rules were quite common at the time § 8(b)(1)(B) was enacted in 1947;[3] indeed, rules prohibiting

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[3] *See* International Brotherhood of Electrical Workers *Constitution*, Art. XVII § 12 p. 26 (1941) (non-signatory employers rule); Bricklayers, Masons and Plasterers International Union of America, *Constitution and Rules of Order*, Art. XVIII § 2 p. 77) (1946) (non-signatory employers rule); United Brotherhood of Carpenters and Joiners of America, *Constitution and Laws*, § (T) (p. 33) (1944) (non-signatory employers rule); International Union of Elevator Constructors, *Constitution and By-Laws*, Art. VIII § 6 (p. 19) (1946) (withdrawal penalties for members working for non-signatory employers in industry); International Association of Heat and Frost Insulators and Asbestos Workers, *Constitution and By-Laws*, Art. XV § 1 (p. 23) (withdrawal restrictions), Art. XV § 9 and § 11 (pp. 29-30) (union wage scale) (1942); International Union of Operating Engineers, *Constitution*, Art. XXIII, Subdiv. 3 (pp. 82-83) (non-signatory employer), Art. XV (p. 55) (withdrawal restrictions) (1944); Sheet Metal Workers International Association, *Constitution and Ritual*, Art. VII, §§ 2, 5 (pp. 25, 26) (1946) (union wage scale), § 19 (p. 31) (non-signatory employer), Art. XV, §§ 1, 2 (withdrawal restrictions) (1946); United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, *Constitution and By-Laws*, Art. II § 7 (p. 12) (union wage scale), Art. II § 18 (p. 14) (non-signatory employers), Art. IV § 4 (p. 26) (withdrawal restrictions) (1940); Brotherhood of Painters, Decoraters and Paperhangers of America, *Constitution* § 303 (p. 104) (non-signatory employer), § 304 (p. 104) (union wage scale) (1947); International Association of Bridge, Structural and Ornamental Iron Workers, *Constitution*, Art. XVII §§ 13, 14 (pp. 51-53) (withdrawal restrictions), Art. XVIII, § 7 (pp. 76-77) (union wage scale) (1944); Operative Plasterers' and Cement Finishers' International Association, *Constitution* §§ 158-60 (p. 56) (1948) (non-signatory employer); *see also* United Mine Workers of America, *Constitution of the International Union*, Art. XIV § 10 (p. 52) (1938) (working in non-union mine); United Stone and Allied Products Workers of America, *Constitution*, Art. XLIII § 1(f) (p. 76) (1946) (non-signatory employer); Oil Workers International Union, *Constitution and By-Laws*, Art. IV § (p. 61) (1946) (union wage scale); Amalgamated Clothing Workers of America, *Constitution*, Art. IX, § 8 (p. 21) (1948) (withdrawal restrictions); International Association of Machinists, *Constitution*

union members from working for non-union employers date from the beginnings of the labor movement in this country, and were long enforced at common law.[4] The nation's oldest national union, the International Typographical Union, adopted such a rule prior to 1885,[5] and the IBEW's very first constitution, adopted at its founding in 1891,[6] included a similar prohibition.

Such union rules further a vital union interest: the "elimination of . . . competition based on differences in labor standards." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503 (1940). That "is the objective of any national labor organization," *id.*, and it is the predicate of the federal labor laws which embody a "strong labor policy favoring the association of employees to eliminate competition over wages and working conditions," *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 622 (1975). As this Court recognized long ago, to be "at all effective" in this endeavor

> employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the community united, because in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood. [*American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921).]

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of the Grand Lodge, District and Local Lodges, Art. E § 1 (p. 75) and Art. I, § 1 (p. 82) (1946) (minimum union wage).

[4] *See, e.g., Schauten v. Alpine*, 215 N.Y. 225 (1915); *Meurer v. Detroit Musicians*, 95 Mich. 451 (1893); Summers, *Legal Limitations on Union Discipline*, 64 Harv.L.Rev., 1049, 1064 (1951).

[5] *See American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782, 787-89 (7th Cir. 1951), *aff'd*, 345 U.S. 100 (1953); G. Fink, *Labor Unions*, 301 (1977).

[6] Constitution of the National Brotherhood of Electrical Workers of America, First Convention, Art. XIX § 9 (1891). *See* M. Mulcaire, *The International Brotherhood of Electrical Workers: A Study in Trade Union Structure and Function* 42 (1923).

It is for that reason that unions seek to organize as many workers as possible within an industry, and then seek to assure that union members work only for employers paying collectively-bargained wages. There can be no doubt that the understanding of § 8(b)(1)(B) that the Board champions here would significantly limit the ability of labor unions to achieve this central aim.

The logic of the Board's theory would, moreover, make it unlawful for a union to limit its membership to rank-and-file workers and to exclude *all* supervisors from union membership (regardless of where the supervisor works) as such a rule would have "the reasonably foreseeable and intended effect" of causing union members who desire to maintain their union membership not to accept supervisory positions. Yet, at the time § 8(b)(1)(B) was enacted, many unions, in an exercise of a core aspect of their associational freedom—the "freedom to identify the people who constitute the association and to limit the association to those people only," *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981)[7]—allowed only rank-and-file workers to maintain their membership and terminated the membership of those who accepted a supervisory post.[8] And at the same time § 8(b)(1)(B)

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[7] *See also Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (A "regulation that forces the group to accept members it does not desire" is a "clear[] example of an intrusion into the internal structure and affairs of an association").

[8] *See, e.g.*, United Automobile, Aircraft and Agricultural Implement Workers of America, *Constitution of the International Union*, Art. 6 § 10 (p. 10) (1946); United Mine Workers of America, *Constitution of the International Union*, Art. XIV § 2 (p. 48) (1938); Amalgamated Clothing Workers of America, *Constitution*, Art. IX § 1 (p. 19) (1948); United Stone & Allied Products Workers of America, *Constitution*, Art. X § 1(b) (p. 25) (1946); American Communications Association, *International Constitution*, Art. V §§ 1(a), 17 (1944); United Steelworkers of America, *Constitution of the International Union*, Art. III (p. 4) (1946); Industrial Workers of the World, *Preamble and Constitution*, Art. II § 1(a) (p. 9) (1946).

was enacted Congress also amended the NLRA to make it lawful for an employer to prohibit his supervisors from belonging to a union, *see* NLRA §§ 2(3), 14(a), 29 U.S.C. § 152(3), 164(a); those sections were enacted because Congress believed that granting supervisors the legal right to join a union representing rank-and-file employees "is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors" and "is inconsistent with our policy to protect the rights of employers." H.R. Rep. 245, 80th Cong. 1st Sess. at 14 (1947). Yet, the Board's reading of § 8(b)(1)(B) would transform that section into a vehicle requiring unions to remain open to workers who opt to become supervisors.

2. The Board makes no attempt to justify its far-reaching and anomalous interpretation of § 8(b)(1)(B) by reference to the language and history of that provision —the traditional sources for statutory interpretation. Instead, the Board dismisses the legislative materials as quickly as possible, *see* NLRB Br. at 8-10, and devotes the remainder of its brief to parsing this Court's decision in *ABC* in the apparent belief that *ABC* is determinative of the instant case. But as we now show, the question decided in *ABC* is analytically distinct from the question presented here, and *ABC*'s holding does not compel the conclusion for which the Board here argues. And while the *ABC* opinion does contain language that can be read to support the Board's argument, the fairer reading is that those passages were not intended to apply to, much less dictate the result in, the present context.

As the Court stated in *ABC*, although § 8(b)(1)(B) has not been amended since enacted by Congress in 1947, the "application" of that section has "continued to evolve" under successive Labor Boards. 437 U.S. at 423. In order to understand *ABC*, it is useful to begin by briefly tracing that evolution, as the Court did in *ABC* itself. *See id.* at 422-26.

"For more than 20 years after § 8(b)(1)(B) was enacted in 1947, the Board confined its application to situations clearly falling within the metes and bounds of the statutory language," *FP&L*, 417 U.S. at 798, *viz*, to cases in which "pressures [were] exerted by [a] union directly upon [an] employer to force him into a multi-employer bargaining unit or otherwise to dictate or control the choice of his representative for the purpose of collective bargaining or adjusting grievances in the course of administering an existing contract," *ABC*, 437 U.S. at 422-23. During that period no broader sweep was ever imputed to § 8(b)(1)(B).

"In 1968, however, the Board significantly expanded the reach of § 8(b)(1)(B) with its decision in *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications, Inc.)*, 172 NLRB 2173." *FP&L*, 417 U.S. at 799-800. In that case, "the Board applied the section to prohibit union discipline of one of its member-supervisors for the manner in which he had performed his supervisory task of grievance adjustment." *ABC*, 437 U.S. at 423. The Board in *Oakland Mailers* reasoned that by seeking to "compel the employer's foremen to take pro-union positions in interpreting the collective bargaining agreement," the union in that case "interfered with the [employer's] control over his representatives" and thereby "indirectly" coerced the employer to dispense with the services of the supervisor whom the employer otherwise would have desired to retain as the employer's representative. *Oakland Mailers, supra*, 172 NLRB at 2173-74.

"Subsequent Board decisions extended § 8(b)(1)(B) to proscribe union discipline" of a supervisor-member "whenever he was engaged in management or supervisory activities, even though his collective bargaining or grievance adjustment duties were not involved." *FP&L*, 417 U.S. at 800-02. "Through the course of these decisions, § 8(b)(1)(B) thus began to evolve in the view of the Board and the [lower] courts 'as a general prohibi-

tion of a union's disciplining of supervisor-members for their conduct in the course of representing the interests of the employer,' or for acts 'performed in the course of [their] management duties.' " *Id.* at 802.

In *FP&L* and *ABC* the Court confronted this understanding of § 8(b)(1)(B) in the context of cases in which supervisor-members were disciplined by their union for reporting to work during a strike against their employers. In *FP&L* the supervisor-members had reported to work to perform "rank-and-file struck work," 417 U.S. at 793; the Court concluded that the union discipline did not violate § 8(b)(1)(B) because it did not threaten to "adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer," *id.* at 804-805. But in *ABC*, in which the supervisor-members were disciplined "for crossing the union picket line during a strike and performing [their] regular supervisory duties, which included the adjustment of grievances," 437 U.S. at 413, the Court sustained the Board's conclusion that these individuals were being disciplined for their acts *qua* supervisors and that such discipline "would or might adversely affect the performance of the [supervisor-members'] grievance-adjustment duties," *id.* at 432.

The *ABC* Court distinguished *FP&L* by observing that " '[w]hen a supervisor forsakes his supervisory role to do rank-and-file work ordinarily the domain of nonsupervisory employee he is no longer acting as a management representative and no longer merits any immunity from discipline.' " *Id.* at 424. And the *ABC* Court reasoned that disciplining a union member for what he does "as a management representative" is different for two reasons: first, disciplined supervisor-members (who in *ABC* were referred to as "hyphenates") "might be tempted to give the union side of a grievance a more favorable slant while the threat of discipline remained"; and, second, in any event "the employer could not be certain that a fined

hyphenate would willingly answer the employer's call to duty during a subsequent work stoppage, particularly if it occurred in the near future." *Id.* at 435. The Court thus concluded:

> Union pressure on supervisors can affect either their willingness to serve as grievance adjusters or collective bargainers, or the manner in which they fulfill these functions; and either effect impermissibly coerces the employer in his choice of a representative. [*Id.* at 436.]

The Board bases virtually its entire argument on the words just quoted, which the Board interprets as establishing an independent rule that any union discipline which affects union members' "willingness to serve" as management's representatives violates § 8(b)(1)(B).[9] That is, admittedly, one possible reading of the quoted language. But, read fairly, the foregoing passage suggests a far narrower rule.

As previously noted, the crucial fact in *ABC* was that the "hyphenates" were "management representative[s]" and that *the union, having allowed its members to assume that status, was seeking to use the hyphenates' union membership to regulate the hyphenates' conduct as management representatives.* In other words, in *ABC* (as in *Oakland Mailers*), the union was "interfer[ing]

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[9] The Board also heavily relies on the footnote to the passage quoted in text in which the Court reviewed the reasoning of the United States Court of Appeals for the District of Columbia in *FP&L*, observing that in that case the appellate court had "noted its agreement with *New Mexico District Council of Carpenters and Joiners of America (A. S. Horner, Inc.)*, 177 NLRB 500 (1969), *enf'd*, 454 F.2d 1116 (C.A. 10, 1972)," a case which is quite similar to the instant case. *See* ABC, 437 U.S. at 436 n.36. The Board claims that the Court in *ABC* "cited that aspect of *A. S. Horner* with approval," NLRB Br. at 13, *see id.* at 16-18; we do not so read the footnote which is, in terms, limited to an explication of the reasoning of the appellate court in *FP&L*. Indeed, if that footnote were to constitute approval of *A. S. Horner*, it would, for the reasons explained in text, go considerably beyond the body of the *ABC* opinion and address an issue that was not raised in *ABC*.

with the employer's control over his representative," as the Court stated in *ABC*, 437 U.S. at 423, using almost the identical words that the Board has used in *Oakland Mailers*, 172 NLRB at 2173. It was in this context that the Court discussed what "effect[s]" are "impermissibl[e]" under § 8(b)(1)(B). So understood, the language from *ABC* on which the Board here relies can be read to mean that where a union "interfere[s] with the employer's control over his representatives" by disciplining individuals for their conduct *qua* management representatives the union's action is unlawful regardless of whether the ultimate *impact* of the discipline is to "affect [the supervisors'] willingness to serve as grievance adjustors or collective bargainers, or the manner in which they fulfill these functions." *ABC*, 437 U.S. at 436. On this reading, *ABC*—and § 8(b)(1)(B)—*would safeguard the employer's control over his representatives, but would not preclude a union from seeking to prevent its members from becoming management's representatives.*

3. The question as to what *ABC* means thus can be reformulated as follows: should *ABC* be interpreted to proscribe all union action that can be said to affect a union member's "willingness to serve" as management's representative, or should *ABC* be interpreted to proscribe only union action which "interferes with the employer's control over his representative" and *thereby* affects the representative's "willingness to serve?" Because what is at stake in the choice between these two interpretations of *ABC* is a decision as to the reach of § 8(b)(1)(B), we submit that the question is best resolved not by further parsing the words of *ABC*,[10] but by examining the language and history of the statute. One additional consideration peculiar to this case reinforces that approach.

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[10] *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("the language of an opinion is not always to be parsed as though we were dealing with the language of a statute").

Although the Board's counsel here boldly argue for the first interpretation of *ABC* and of § 8(b)(1)(B), the Board's own *decisions* are far less clear and, indeed, are internally inconsistent. In particular, the Board has struggled unsuccessfully with the question whether union discipline against union members who leave rank-and-file positions to become temporary supervisors is unlawful.

In three cases—two of which predate *ABC* and the third of which was decided within a week of *ABC* (and does not cite this Court's decision)—the Board, consistent with the position championed here, answered that question in the affirmative and held the unions in those cases guilty of violating § 8(b)(1)(B) by adopting and enforcing such rules.[11] But in *National Association of Letter Carriers*, 240 NLRB 519 (1979), which was decided *after ABC*, the Board reached the opposite conclusion in a case in which a union, by constitutional amendment, denied membership status to those accepting positions as temporary supervisors and precluded such individuals from participating in the union's health-insurance plan. In holding that the adoption of that union rule was *not* unlawful, the Board reasoned:

> The fact that the Postal Service may have fewer letter carriers who are willing to serve as temporary supervisors as a result of the [union's constitutional] amendment in no way affects the Postal Service's selection of *which* letter carriers will serve as temporary supervisors. The method for selecting temporary supervisors remains completely within the control of the Postal Service. The decision to place one's name on the list of employees who are willing to serve as temporary supervisors remains completely within the power of each individual letter carrier, and the decision to rate an employee as eligible to serve as temporary supervisor remains com-

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[11] *Teamsters Local 663*, 193 NLRB 581 (1971); *Communications Workers Local 1132*, 226 NLRB 97 (1976), *enf'd*, 562 F.2d 37 (2d Cir. 1977); *Systems Council T-6*, 236 NLRB 1209 (1978), *enf'd*, 559 F.2d 5 (1st Cir. 1979).

> pletely within the power of the Postal Service. The final decision to appoint an employee as a temporary supervisor, and the final decision to accept such an appointment, remains solely within the power of the Postal Service and the employee respectively. *Nothing that the [union] has done can influence this selection procedure.* [*Id.* at 525; last emphasis added.]

In support of this conclusion, the Board cited *ABC*. *See* 240 NLRB at 525 n. 29. Thus, although the Board's theory here accords with *some* of its decisions, that theory is manifestly inconsistent with other recent NLRB precedent.[12] It is therefore particularly appropriate in this case, in order to resolve the conflict in the Board's decisions and to choose between the alternative interpretation of *ABC*, to turn to the legislative materials.

B. The Legislative Materials

So far as we can determine, in enacting § 8(b)(1)(B), Congress did not focus specifically on and reject in terms the theory the Board here seeks to extract from *ABC*, *viz.*, that § 8(b)(1)(B) prohibits all union actions that tend to reduce the size of the pool of would-be supervisors. But as we proceed to show—based on a review of the origins of § 8(b)(1)(B), its authoritative legislative explanations, and the political context in which it was enacted—that section was intended, understood and defended as a narrow prohibition addressing two precisely defined evils far removed from the Union's conduct in the instant case. The Board's attempt to expand the reach of § 8(b)(1)(B) to cover conduct of the type involved here is at war with the "gamut of values current" when that section was enacted. *Woodwork Manufacturers v. NLRB*, 386 U.S. 612, 620 (1967).

1. In order fully to understand the legislative history, some brief background is required as to the political setting in which Congress was acting. From the time the

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[12] *See also The Tribune Co.*, 226 NLRB 379 (1976).

Wagner Act was enacted in 1935, bills were introduced in every Congress to amend that Act in various respects. No bill cleared Congress until 1946, however, when the Case bill, H.R. 4908, 79th Cong., 2d Sess.—the "direct antecedent" of the LMRA, *Doud Box Co. v. Courtney*, 368 U.S. 502, 509 (1967)—was approved by Congress, 92 Cong. Rec. 5739, 5946. That bill was vetoed by President Truman, and Congress failed to override the veto. *Id.* at 6674-78.

In the 1946 elections, the Republicans gained control of both the House and the Senate; the Republicans held a 57-vote majority in the House (246-189) and a six-vote majority in the Senate (51-45).[13] Facing a "predictable presidential veto," *Pipefitters v. United States*, 407 U.S. 385, 409 (1972), and the need to develop legislation that two-thirds of the Congress would support in order to override that anticipated veto, the Eightieth Congress took up the subject of labor law revision.

2. The House Committee on Education and Labor, chaired by Representative Hartley, was the first to report out a labor law bill in 1947. That bill was sweeping in its scope; before the Act was finally passed Representative Hartley stated that "we deliberately put everything we could into the House bill." [14] As reported by the Committee—and as approved by the House with minor changes following brief debate—the Hartley bill: would have precluded any union from representing the employees of more than one "competing employer" (H.R. 3020, 80th Cong., 1st Sess. § 9(f)(1)); would have made it unlawful for employees of "competing employers" to act in concert (*id.* §§ 2(16), 12(a)(3)(A)); would have proscribed sympathy strikes (*id.* §§ 2(13), 12(a)(3)(A)), strikes (or economic pressure) over unfair labor practices

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[13] S. Bailey & H. Samuel, *Congress at Work*, 416 (1952). This was the first time since before the Wagner Act was passed that the Republicans controlled Congress. Reilly, *The Legislative History of the Taft-Hartley Act*, 29 G.W.L.Rev. 285, 289 (1966).

[14] *New York Times*, May 30, 1947.

(*id.* § 12(A)(B)), informational or labor-standards picketing (*id.* § 12(a)(2)), and strikes (or economic pressures) aimed at work preservation (*id.* §§ 2(17), 12(a)(3)(B)) or at obtaining recognition for a majority-representative as the exclusive representative (*id.* § 12(a)(3)(C)(i)); and would have required, as a condition of any strike, a government-conducted election in which an absolute majority of the bargaining unit voted to strike (*id.* § 2(11)(B)(vi)). As to most of these practices, unions which committed wrongs would have been subject to private damage actions (*see id.* § 12(b)) and to injunctions, notwithstanding the provisions of the Norris-LaGuardia Act (*see id.* § 12(c)).[15]

The House Committee stated the philosophy animating its bill as follows:

> For the past 14 years, as a result of labor laws ill-conceived and disastrously executed, the American workingman has been deprived of his dignity as an individual . . . [H]is mind, his soul, and his very life have been subject to a tyranny more despotic than one could think possible in a free country.
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> The employer's plight has likewise not been happy. He has witnessed the productive efficiency in his plants sink to alarmingly low levels. He has been required to employ or reinstate individuals who have destroyed his property and assaulted other employees. . . . He has seen the loyalty of his supervisors undermined by the compulsory unionism imposed upon them by the National Labor Relations Board. He has been required by law to bargain over matters to which it was economically impossible for him to accede, and when he refused to accede he has been accused of failing to bargain in good faith. He has been compelled to bargain with the same union that

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[15] The text of H.R. 3020 as reported by the House Committee and as approved by the House is reprinted in National Labor Relations Board, *Legislative History of the Labor Management Relations Act of 1947*, at 31-98, 158-225 (hereinafter "Leg. Hist. at ——").

> bargains with his competitors and thus to reveal to his competitors the secrets of his business. He has had to stand helplessly by while employees desiring to enter his plant to work have been obstructed by violence, mass picketing, and general rowdyism. He has had to stand mute while irresponsible detractors slandered, abused, and vilified him.
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> * * *
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> This sordid story was unfolded before the committee in its hearings. Those hearings demonstrate the need for action by Congress—and action now. [H.R. Rep. No. 245, 80th Cong., 1st Sess. 4-5 (1947), *reprinted in* 1 Leg. Hist. at 295-96.]

In this context, what is most significant about the Hartley bill is that *it did not include any analogue to what is now § 8(b)(1)(B)*. That bill provided employers absolute protection from being pressured into joining a multi-employer bargaining unit by outlawing multi-employer bargaining, and the bill gave employers absolute control over their supervisors by removing supervisors from the definition of "employees" (*see* H.R. 3020, *supra*, § 2(3)). But having done that much, no one in the House apparently deemed it necessary to further protect employers in selecting their representatives.[16]

3. While the House was developing the Hartley bill, the Senate Committee on Labor and Public Welfare was also at work. At the start of the Eightieth Congress, Senator Ball, a member of that Committee, introduced

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[16] The House bill did include a section aimed at regulating the internal affairs of unions in order to promote "democracy in unions" and to give union members "greater control of the union's affairs." H.R. Rep. No. 245, *supra*, at 7, 1 Leg. Hist. at 298. That section, while "recogniz[ing] the right of the union to maintain discipline in the ranks and to expel members who are disloyal to the union," *id.*, contained some limitations on the grounds on which union discipline could be imposed. There is no suggestion in the legislative history that these limitations were intended to protect employers from "indirect coercion" resulting from union discipline of supervisors who also are union members.

four bills [17] drafted by Gerard Reilly, whom the Labor Committee later hired as its Special Counsel for that purpose.[18] Those bills became the subject of extensive hearings in the Senate Committee and the source of much of what was eventually enacted in the LMRA.

The Ball bills were, in many respects, similar to the bill Representative Hartley developed. Of particular relevance here, one of the Ball bills would have made it unlawful for a union to represent the employees of more than one competing employer, or to act in concert with a union representing employees of a competing employer; such a prohibition, of course, would have spelled the end of multi-employer bargaining. *See* S. 133, *supra*. Another Ball bill would have removed supervisors from the protection of the NLRA. S. 360, *supra*, §§ 2, 10. Senator Ball also proposed a section prohibiting unions from restraining or coercing employees in the exercise of their § 7 rights, *see* S. 360, *supra*, § 5; that proposal eventually was adopted, in somewhat modified form, as § 8(b)(1)(A). But none of the Ball bills contained any provision analogous to what eventually was enacted as § 8(b)(1)(B).[19]

Thus, unlike most other provisions of the LMRA, § 8(b)(1)(B) did not have its genesis in either the Hartley bill or in the Ball bills. Rather, that section can be traced to two bills introduced towards the close of that Committee's hearings by Senators Morse and Ives, two Republican

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[17] S. 55, S. 105, S. 133, S. 360, 80th Cong., 1st Sess. (1947).

[18] Reilly, *supra*, n.13 at 289-290, 294 n.14.

[19] In addition to the provisions noted in text, the Ball bills also would have outlawed all forms of union security agreements, *see* S. 133, *supra*; modified the Norris-LaGuardia Act so as to permit injunctions against various types of strikes or other concerted economic activity, including unfair labor practice strikes, recognitional strikes, and secondary boycotts, *see* S. 360, *supra*, § 10; S. 55, *supra*, § 204; and would have provided an action for treble damages with respect to secondary boycotts, S. 55, *supra*, § 204(d).

members of that Committee whose views on labor legislation were markedly more temperate than those of Representative Hartley or Senator Ball. *See* S. 858, 80th Cong., 1st Sess.; S. 871, 80th Cong., 1st Sess. (Sen. Ives).[20] Those bills were quite brief and provided for only the most modest of changes in the Wagner Act; neither bill addressed most of the subjects that eventually were dealt with in the LMRA. In particular, neither bill removed supervisors from the definition of employee, and neither bill in any way interfered with the ability of unions to organize on an industry-wide basis, or to engage in multi-employer or multi-plant bargaining. Instead each bill contained a provision—from which § 8(b)(1)(B) eventually was derived—making it an unfair labor practice for a union to coerce an employer in the selection of his bargaining representative.

Following the close of its hearings, Senator Taft, the Chairman of the Labor Committee, prepared a bill in the form of a "tentative committee print" for use by the Committee in its mark-up sessions. That bill incorpo-

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[20] Senator Morse was one of 29 Senators who had voted against the Case bill in 1946. 92 Cong. Rec. 5739. Senator Morse eventually joined only two other Republicans in voting against the bill that became the LMRA, *see* Reilly, *supra*, n.13 at 298, and he played a leading role in seeking to prevent President Truman's veto from being overridden, *see id.* at 300; *see also* S. Bailey & H. Samuel, *supra* n.13, at 438-40; R. Lee, *Truman and Taft-Hartley* at 101 (1966).

Senator Ives was elected to the Senate in 1946 with the support of the American Federation of Labor, *see New York Times*, April 16, 1947, p. 22; while running for office he had opposed the Case bill, Reilly, *supra* n.13, at 293, and had campaigned on a platform opposing any "change in the law affecting industry and labor relations," *New York Times*, Oct. 22, 1946, p. 22; Oct. 26, 1946, p. 18. Ives was offered a position on the Labor Committee in part because he represented a different wing of the party than Senators Taft and Ball; Governor Dewey had urged Senator Ives not to accept a position on the Labor Committee because Ives was "too far to the left to meet the position the Republican party will assume." *New York Times*, April 30, 1947, p. 18.

rated a variant of Senator Ball's proposal to prohibit multi-employer bargaining, and also included a modified version of the proposal of Senators Morse and Ives to prohibit unions from coercing employers in selecting their bargaining representatives. An analysis of the tentative committee print that was distributed to the committee members explained the purpose of this latter provision as follows:

> This would mean that labor organizations could no longer strike against an individual employer in order to force him to bargain through an employer's association. It would also bar strikes by a union to enforce a demand that an employer fire a personnel director or a foreman regarded as obnoxious. [Analysis of Tentative Committee Print of April 7, 1947, 80th Cong., 1st Sess. at 4.]

By a vote of 7-6, the Labor Committee decided *not* to include the Ball proposal with respect to multi-employer bargaining in the Committee's bill;[21] Senators Morse and Ives led the opposition to inclusion of that proposal (as well as to three other proposals that were drawn from Senator Ball's bills and were included in Senator Taft's "tentative committee print").[22] The Committee did agree to include in its bill a variant of § 8(b)(1)(B), derived

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[21] *See* S. Rep. No. 105, Pt. 1, 80th Cong., 1st Sess. at 50, 51-52 (1947) (Supplemental views of Senators Taft, Ball, et al.).

[22] *See, Reilly, supra* n.13, at 295; S. Bailey & H. Samuel, *supra* n.13, at 427; H. Millis & E. Brown, *From the Wagner Act to the Taft-Hartley Act* at 375 (1950).

The other three proposals from the Ball bills that were defeated in committee were: (1) a proposal to make it an unfair labor practice for a union to interfere, restrain or coerce employees in the exercise of the rights guaranteed in section 7; (2) a proposal to regulate welfare funds; and (3) a proposal to authorize damage and injunctive actions against secondary boycotts and jurisdictional strikes. *See* S. Rep. No. 105, Pt. 1, *supra*, at 50-56 (supplemental views of Senators Taft, Ball, *et al.*) The fate of those proposals on the floor of the Senate is discussed *infra* at 24.

from the Morse and Ives bills. Following the explanation of that section in the analysis of the tentative committee print, the Committee's Report explained the import of that language as follows:

> This proscribes unions and their agents from interfering with, restraining, or coercing employers in the selection of their representatives for the purposes of collective bargaining or the settlement of grievances. Thus, a union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegate the function of settling grievances. [S. Rep. No. 105, Pt. 1, 80th Cong., 1st Sess. 21 (1947), *reprinted in* 1 Leg. Hist. at 427.] [23]

Notwithstanding the fact that the Senate Committee bill did not contain any of the most controversial features of the Ball (or Hartley) bills, three Democratic members of the Labor Committee filed a lengthy and blistering dissent from the Committee's Report. *See* S. Rep. No. 105, *supra*, Part 2, *reprinted in* 1 Leg. Hist. 463-504. These dissenters objected to most provisions of the Committee's bill including, *e.g.*, the prohibition on closed shops, *see id.* at 8-10; the provision authorizing the NLRB to conduct decertification elections, *id.* at 11-12; the provision authorizing suits to enforce collective bargaining agreements, *id.* at 13-15; the prohibition on secondary boycotts, *id.* at 19-21; and the exclusion of supervisors from the Act, *id.* at 39-40. Significantly, however, the minority report did *not* view § 8(b)(1)(B) as objectionable; the minority stated "We agree that it should be made an unfair labor practice for a union to interfere with an

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[23] The text of S. 1126 as reported by the Senate Labor Committee is reprinted in 1 Leg. Hist. at 99-157.

employer in the designation of his representatives, as provided by § 8(b)(1)(B)." S. Rep. No. 105, Pt. 2, *supra*, at 41. This was the *only* union unfair labor practice contained in the committee bill with which the minority agreed.

4. The Senate debated the Labor Committee's bill for three weeks. In the course of those debates, Senator Taft explained the approach his Committee had followed in developing its bill:

> We took each of the abuses which were testified to in the evidence and tried to find a remedial provision which could finally become enacted into law. When we got through, eleven members of the committee signed the report, including Senators who hold different views from myself, such as the Senator from Oregon [Sen. Morse]. [2 Leg. Hist. at 1520.]

Against this general background, Senator Taft outlined the intent of § 8(b)(1)(B) by delineating the "abuses" to which it was addressed. Acknowledging that the section "*is not perhaps of tremendous importance*," Senator Taft explained, as had the Committee Report, that under § 8(b)(1)(B)

> employees cannot say to their employer "We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y." That has been done. It would prevent their saying to the employer, "You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work." This is the only section in the bill which has any relation to nationwide bargaining. Under this provision it would be impossible for a union to say to a company, "We will not bargain with you unless you appoint your national employer's association as your agent so that we can bargain nationally." Under the bill, the employer has a right to say, "No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with." I believe the provision is a necessary one,

> and one which will accomplish substantially wise purposes. [2 *Id.* at 1012.]

Later in the debates, Senator Taft echoed this theme stating:

> The union cannot say to an employer, "We will deal with you only if you designate your employers' association as the bargaining agent." The union cannot coerce an employer to join an employers' association. . . . That has a rather indirect effect on nationwide bargaining. [2 *Id.* at 1241.]

And Senator Ellender, a Democratic member of the Labor Committee added:

> Other abuses exist, such as strikes over questions relating to invasion of management prerogatives. It often happens that management is forced to replace a foreman because the union does not like him—because he is too strict. Cases of that nature are very numerous. . . . The bill outlaws such conduct.
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> The bill prevents a union from dictating to an employer on the question of bargaining with union representatives through an employer association. The bill in subsection 8(b)(1)(B) . . . makes it an unfair labor practice for a union to attempt to coerce an employer in the selection of a personnel director or foreman, or other supervisory official. Senators who heard me discuss the issue early in the afternoon will recall that quite a few unions forced employers to change foremen. They have been taking it upon themselves to say that management should not appoint any representative who is strict with the membership of the union. This amendment seeks to prescribe a remedy in order to prevent such interferences. [2 *Id.* at 1066, 1077.]

These are the *only* explanations in the Senate debates of the reach of § 8(b)(1)(B); the section was not otherwise discussed as it was acceptable to all parties. Senator

Murray, the leader of the Democratic opposition stated, "we find no disagreement with the provisions prohibiting coercion of employers in their choice of collective bargaining representatives." 2 Leg. Hist. at 1454. Indeed, Murray included § 8(b)(1)(B) in the Democratic alternative bill which he offered towards the close of the Senate debates. 2 Leg. Hist. at 1439, 1443. Senator Ball described that bill as "made up of all the completely innocuous provisions of [the Committee's] bill, and nothing else." 2 *Id.* at 1499.

Although there were no further discussions of § 8(b)(1)(B) in the Senate, additional insight into its meaning can be gleaned from the debate that took place over the addition of subsection (A) to § 8(b)(1). As reported, § 8(b)(1) was not divided into subsections; it prohibited only "interfere[nce], restrain[t], or coerc[ion]" of an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances. On the floor of the Senate, Senator Ball proposed to add a subsection to § 8(b)(1) to provide employees in the exercise of their § 7 rights the same protection being afforded by the proposed § 8(b)(1) to employers in the selection of their representatives. 2 Leg. Hist. at 1018. That proposal, which had been defeated in the Labor Committee by a vote of 7-6, *see* n. 22, *supra*, generated lengthy debate.

Senator Ives led the initial opposition to the Ball amendment. He expressed concern over "the tremendous possibilities for abuse that [would] exist" if such a prohibition were enacted, arguing that if adopted the Ball amendment "inevitably will serve not alone to discourage legitimate labor organizations, but may later, by interpretation and effect, defeat legitimate attempts at labor organization." 2 *Id.* at 1024-25. But Senator Ball and his supporters provided repeated reassurances that they understood the words "interfere, restrain or coerce"—the words that defined the prohibition for both proposed sub-

sections of § 8(b)(1)—to address only "threats of violence or of reprisal and that sort of thing," 2 *id.* at 1202 (Sen. Ball), and not to "interfere with the internal affairs or organization of unions," 2 *id.* at 1141 (Sen. Ball). *See also* 2 *Id.* at 1200 (Sen. Ball) ("we are not trying to interfere with the internal affairs of a union which is already organized"). And to assure that his amendment would not be overbroad in its reach, Senator Ball accepted a modification proposed by Senator Ives to delete the word "interfere" from § 8(b)(1) so that the violation for either subsection would be limited to acts of "restraint" or "coercion". Senator Ball acknowledged that "interfere" is "very vague," 2 *id.* at 1139, and Senator Taft, in urging Senator Ball to accept the Ives proposal, stated that the original language "is perhaps somewhat broad," *id.* With this modification the Ball amendment was endorsed by Senator Ives, and was overwhelmingly approved by the Senate. *See* 2 *Id.* at 1217 (adopting Ball amendment by vote of 60-28).[24]

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[24] Senator Ives played an equally critical role with respect to several other amendments which had been rejected by the Labor Committee and were offered by Senator Ball on the floor of the Senate. *See* n.22, *supra*.

The Ball proposal to limit multi-employer bargaining was defeated by one vote, 2 Leg. Hist. at 1302, with Senator Ives leading the opposition, *see* 2 *id.* at 1246-50, 1253-54, 1271-84. (Although Senator Taft supported that proposal, he joined in preventing the vote from being reconsidered even though the vote of absentee Senators could have altered the outcome; Senator Taft feared that if this amendment were adopted the bill would not generate sufficient support to overcome the anticipated veto. S. Bailey & H. Samuel, *supra* n.13, at 431-32.)

Senator Ives also successfully opposed the Ball amendment to authorize injunctive and damage actions with respect to secondary boycotts, *see* 2 Leg. Hist. at 1323-24, 1356-57, 1370, and then worked with Senator Taft to develop an alternative amendment providing only for damage actions, which amendment was overwhelmingly approved by the Senate, *see* 2 *id.* 1356-57, 1370-71, 1400.

[Continued]

As thus amended, the Senate Committee's bill passed the Senate by a vote of 68-24. 2 *Id.* at 1522.

5. The House and Senate appointed conferees to resolve the differences between their respective bills; although only a freshman, Senator Ives was appointed as a conferee (ahead of several more senior colleagues) "because it was felt that his views would carry weight with the newly-elected Republican Senators" whose support would be critical to override the anticipated veto.[25] In conference, the House "receded on virtually all the important provisions," in an effort to secure passage of a veto-proof bill;[26] Representative Hartley acknowledged as much in presenting the conference report to the House, *see* 1 Leg. Hist. at 882, 883-884. The conference report was approved by both Houses by wide majorities. 1 *Id.* at 899-900 House vote of 320-79); 2 *Id.* at 1620-21 (Senate vote of 54-17).

As anticipated, President Truman vetoed the Taft-Hartley bill. The House easily overrode that veto by a vote of 331-83. 1 *Id.* at 922-23. In the Senate, however, it was "generally known" that "two Democrats who had voted for the conference report would shift out of loy-

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[24] [Continued]

Only one amendment of Senator Ball's was adopted over Senator Ives' opposition: the amendment regulating welfare funds. *See* 2 *Id.* 1302-03, 1314-15, 1323.

Senator Morse also opposed each of the Ball amendments and, unlike Senator Ives, did not agree to the compromises that were negotiated on two of those amendments. *See* 2 *Id.* at 1182-97, 1357-64. The adoption of these compromises, plus the Ball amendment pertaining to welfare funds (which Senator Morse also opposed, 2 *id.* at 1317-20) led Senator Morse to oppose final passage of the bill, even though he had voted in favor of reporting the Committee's bill.

[25] Reilly, *supra* n.13, at 298.

[26] S. Bailey & H. Samuel, *supra* n.13, at 434. *See also* Reilly, *supra* n.13, at 298-99; H. Millis & E. Brown, *supra* n.22, at 384-85.

alty to the Administration" and that opponents of the bill needed "to gain [only] three more votes." [27] The opponents conducted a brief filibuster in the hopes of securing those votes; as part of the filibuster, Senator Morse held the floor from 6:30 a.m. until late in the afternoon of the second day of the debate.[28] No additional Senators changed their positions, however, and the Taft-Hartley bill was enacted into law.

6. One year after the LMRA was enacted, the Democrats regained control of both the House and the Senate, and an attempt was made to repeal that law. Although nothing ultimately came of that effort, the record of that effort provides yet additional insight into the contemporaneous understanding of § 8(b)(1)(B).

Within a few months after the Eighty-First Congress convened, the Senate Labor Committee reported out a bill to repeal the LMRA. *See* S. Rep. No. 99, Pt. 1, 81st Cong., 1st Sess. (1949). Senator Taft, who was then the ranking minority member of that Committee, opposed the bill and in his minority report propounded a series of amendments to the Committee's bill which would have reenacted most of the LMRA; among the provisions he proposed to reenact was § 8(b)(1)(B). He explained the point of that section in precisely the same terms as he had used when the section was enacted two years earlier:

> The typical situation to which this provision would apply is illustrated by the case of the Southern Coal Producers and the United Mine Workers Union . . . The miners' union refused to recognize the association or its president . . . as the representative of the operator members. [S. Rep. No. 99, *supra*, Pt. 2 at 25.]

Again, no other purpose was attributed to § 8(b)(1)(B).

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[27] Reilly, *supra* n.13, at 300.

[28] S. Bailey & H. Samuel, *supra* n.13, at 439.

C. The Lessons

Against this background, we return to the question: should § 8(b)(1)(B) and *ABC* be understood to prohibit all union conduct which tends to affect the willingness of union members to serve as management's representatives, or should § 8(b)(1)(B) and *ABC* be read more narrowly to proscribe union conduct which interferes with an employer's control over his representatives. For two reasons, we submit, the materials just reviewed compel the narrower reading.

First, the authoritative explanations of § 8(b)(1)(B) in the legislative history—from the first statement in the analysis of the Senate Committee's tentative print to Senator Taft's explanation in 1949 in the course of a consideration of a bill to repeal the LMRA—clearly and consistently define the purposes of that section in narrow terms and contain no hint of any congressional intent to go so far as to prohibit unions from enforcing rules against union members working as supervisors generally, or as supervisors for non-union employers. Rather, § 8(b)(1)(B) was described time and again as a narrow provision addressed to two specific and identified evils: union actions forcing employers into multi-employer bargaining units or forcing employers to hire or fire a particular individual as a supervisor. No other purpose was ever suggested for § 8(b)(1)(B).

Second, the political context in which the section was enacted makes clear that there was not some broader, unspoken intent underlying the section. The fact that the section originated with Senators Morse and Ives, and not Senator Ball or Representative Hartley, is probative of the limited reach intended for § 8(b)(1)(B). Moreover, the section was included in the Senate Labor Committee's bill whose content was determined by the more moderate members of the Committee, and it was that Committee's substitute for a more severe limitation on multi-employer bargaining. Indeed, even Senator Murray

and the other opponents of the Committee bill endorsed this provision, while Senator Taft described the section as "not perhaps of tremendous importance," and Senator Ball referred to it as one of the "innocuous" provisions of the bill. And on the floor of the Senate the provision was watered-down further by deleting the prohibition on acts of "interference" (as distinguished from acts of "restraint" or "coercion"). Against this background, it is simply inconceivable that § 8(b)(1)(B) was understood or intended by anyone in Congress to go beyond the limited statement of its purpose.

We recognize, of course, that the legislative materials just reviewed, and the analysis of those materials set forth above, not only compel rejection of the Board's argument in the instant case but also call into question *Oakland Mailers* as well. It is, indeed, our view that the ultimate lesson to be drawn from these materials, is that the Board's understanding of § 8(b)(1)(B) for the first two decades after that section was enacted—that the section "prohibit[s] only direct union pressure designed to compel an employer to replace its chosen representative," NLRB Br. at 10, and not the so-called "indirect coercion" supposedly resulting from union discipline of union members—is the correct understanding.[29] And it is noteworthy in this regard that the Board in *Oakland Mailers* did not treat with any of the legislative materials.

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[29] The fact that the Board so interpreted the statute shortly after it was enacted, and adhered to that interpretaion for two decades, is itself probative. *See, e.g., Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933) (the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" is entitled to "peculiar weight"); *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U.S. 349, 351-52 (1941) ("the want of assertion of power by those who presumably would be alert to exercise it is . . . significant in determining whether such power was actually conferred").

That conclusion is buttressed by the statutory text. Section 8(b)(1)(B), in terms, makes it an unfair labor practice for a union to "restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." That language naturally suggests a prohibition on direct pressure on employers with respect to the employer's choice of a representative; it strains the statutory words to the breaking point to find a prohibition on union discipline of supervisor-members. Although such discipline may affect a member's willingness to serve as a supervisor or an employer's willingness to hire the member as a supervisor, such union discipline still leaves the employer with a free choice as to whom to hire as his representative. And, it is that choice that § 8(b)(1)(B) safeguards from union pressure or reprisals.

Notwithstanding the foregoing considerations, in *ABC* the Court stated that it was "not prepared at this juncture to override" the Board's conclusion in *Oakland Mailers*. 437 U.S. at 437. We do not urge the Court to revisit that decision here. As we have seen, the theory the Board propounds in the instant case represents yet a further extension of *Oakland Mailers*, one not compelled by the decisions to this point. *See* pp. 13-16, *supra*. In this context, the words of Chief Justice Burger, speaking for the Court in *United States v. 12 200-Ft. Reels of Films*, 413 U.S. 123, 127 (1973), are especially apt:

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond."

The legislative materials provide a wholly rational basis for drawing such a line at *Oakland Mailers* and not allow-

ing the the doctrine to be extended to cover cases in which a union seeks only to prevent its members from assuming supervisory positions. The core concern underlying *Oakland Mailers* and underlying what we propose as the preferred interpretation of *ABC*—that supervisors should not be subject to union control for the manner in which they perform their supervisory responsibilities—is at least a concern shared by the Congress that enacted the LMRA, albeit not one that § 8(b)(1)(B) was designed to address.[30] But *Oakland Mailers* fully vindicates that concern by proscribing union conduct that interferes with an employer's control over his representatives.

The extension of *Oakland Mailers* that the Board here champions is *not* justified by the interest in protecting employers from supervisors with divided loyalties. Rather, the value underlying the Board's decision in the instant case is quite different: protecting employers from any diminution in the size of the pool from which they hire their supervisors, thereby assuring employers the ability to hire as management representatives persons who are union members.

There is not one iota of evidence in the statutory materials to suggest that Congress shared *that* value or that Congress sought to preclude unions from inducing their

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[30] As the Court explained in *FP&L*, "it is clear that the conflict-of-loyalties problem that the Board has sought to reach under § 8(b)(1)(B) was intended by Congress to be dealt with in a very different manner." 417 U.S. at 811. "Congress' solution" was to exclude supervisors from the coverage of the Act, so that the employer would be "at liberty to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor union." *Id.* at 812. "[I]t is quite apparent, given the statutory language and the particular concerns that the legislative history shows were what motivated Congress to enact § 8(b)(1)(B), that it did not intend to make *that* provision any part of the solution of the generalized problem of supervisor-member conflict of loyalties." *Id.* at 813 (emphasis in original).

members not to enter the pool of would-be-supervisors. To the contrary, the legislative materials are replete with evidence of Congress' reluctance to intrude into internal union affairs in the manner the Board's theory in this case requires.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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No. 85-1924

Supreme Court, U.S.
FILED
FEB 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

Respondent expressly abandons (Resp. Br. 8 n.2) the court of appeals' interpretation of Section 8(b)(1)(B) as prohibiting union discipline of supervisor-members for serving as grievance adjusters or collective bargainers for an employer disfavored by the union only when the union represents or has "demonstrated an intent to represent" (Pet. App. 6a) that employer.[1] Instead, respondent seeks

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[1] It is not surprising that the respondent abandons the court of appeals' interpretation. While the court of appeals asserted that the Union had not demonstrated an intent to represent the employees of the nonsignatory employers because it had not engaged in such conduct as "picketing, handbilling, making statements of interest to the employers, or passing out opposition cards" (Pet. App. 7a), the history of the ongoing controversy between the Union and electrical contractors in its geographic area, including Nutter and Royal, makes it clear that the Union's coercive action directed at Nutter and Royal was part of a campaign to represent all the employees of electrical contractors in its area. See Pet. App. 22a-26a, 33a, 34a; see also Brief of Amici Curiae National Electrical Contractors Association, et al. at 4-13. As noted in our opening brief (at 20 n.13), the court of appeals

to support the court's judgment with another, equally flawed, interpretation of Section 8(b)(1)(B).

1.a. As we have explained, the Board interprets Section 8(b)(1)(B) as proscribing union discipline of members for accepting supervisory positions with particular employers whom the union disfavors. Respondent contends (Br. 12) that the Board's interpretation would give the section a broader reach than Congress intended and would "transform that section into a vehicle requiring unions to remain open to workers who opt to become supervisors." Respondent therefore suggests that the Court interpret the section to proscribe "union discipline aimed at controlling the manner in which union members represent management," but not "union discipline aimed at preventing union members from accepting management positions" (*id.* at 8 n.2).

The distinction respondent proffers ignores the plain language of Section 8(b)(1)(B). That language cannot abide an interpretation that would, as respondent proposes, "safeguard the employer's control over his representatives, but would not preclude a union from seeking to prevent its members from becoming management's representatives" (Resp. Br. 16 (emphasis omitted)). The statute proscribes union coercion of an employer "in the *selection* of his representatives for the purposes of collective bargaining or the adjustment of grievances" (29 U.S.C.

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erred in not accepting the Board's findings in that regard. The Union does not deny that it had a dispute with Nutter and Royal (indeed, the Union proceeded against the employees under a provision of the Union constitution that prohibits members from working for an employer "whose position is adverse or detrimental to the [Union]" (J.A. 152)). The Union merely differs with the characterization of that dispute as recognitional, choosing to describe it as involving the employers' failure to adhere to area standards (Resp. Br. 3-4). There is no support for an interpretation of Section 8(b)(1)(B) that would make its application turn on the nature or level of intensity of the dispute between the union and the disfavored employer.

158(b)(1)(B) (emphasis added)). If the word "selection" has any meaning, it must accord the employer the right, free of union coercion, to *choose* his management representatives—and not merely the right to insure that a selected representative is thereafter free of union control.

b. In a further attempt to limit the reach of Section 8(b)(1)(B), respondent devotes much of its brief (Br. 18-31) to arguing that the provision was aimed narrowly at "two precisely defined evils" (*id.* at 18). But respondent's own submission (*id.* at 25-27) confirms that one of those evils was a union's attempt to coerce the selection or removal of an employer's grievance representatives. The Report of the Senate Labor Committee, quoted by respondent (*id.* at 25), explicitly states that "this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances." S. Rep. 105, 80th Cong., 1st Sess. Pt. 1, at 21 (1947); see Gov't Br. 9-10.

c. For more than 20 years, the Board has recognized that an employer's freedom to select his grievance adjustment representatives may be taken away just as effectively by union discipline against a supervisor-member with grievance adjustment functions as by direct union pressure on the employer to remove a particular grievance adjuster. See *San Francisco-Oakland Mailers' Union No. 18,* 172 N.L.R.B. 2173 (1968) (*Oakland Mailers*).[2] Respondent does not directly challenge the rationale of *Oakland*

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[2] In *Oakland Mailers,* the union had fined supervisor-members for the manner in which they assigned work under an existing collective bargaining agreement between the union and the employer. The Board found that, although the union "sought the substitution of attitudes rather than persons, and may have exerted its pressures upon the [employer] by indirect rather than direct means," realistically, the pressure required the employer either "to replace its foremen or face *de facto* nonrepresentation by them." 172 N.L.R.B. at 2173.

Mailers.[3] It urges, however, that while Section 8(b)(1)(B) may proscribe such indirect union interference "with an employer's control over its representatives" (Br. 35), the provision should not be construed to proscribe union discipline aimed at preventing union members from accepting supervisory positions in the first place.

That contention is simply another version of respondent's argument that, despite its plain language, Section 8(b)(1)(B) does not apply to the selection of management representatives. It is true that *Oakland Mailers* arose in a situation where the union sought to control how the supervisor-members exercised their collective bargaining or grievance adjustment functions, not to affect their willingness to work as supervisors for the disfavored employer (see n. 2, *supra*). But Section 8(b)(1)(B) in terms protects the employer's right to *select* grievance adjustment and collective bargaining representatives free of union coercion. *Oakland Mailers* prohibited disciplining supervisor-members for their *performance* because of the effect on employer *selection,* and the present case—in which the discipline restrains the employers' selection altogether—is in this respect *a fortiori* to that one.

2.a. Respondent argues that Section 8(b)(1)(B) should be interpreted to prohibit only direct union pressure on the employer to block the selection, or compel the removal, of grievance adjustment and collective bargaining representatives, and not indirect union pressure that has or may have the same effect. Respondent's contention is contrary to the decisions of this Court, which specify that the focus of analysis under Section 8(b)(1)(B) is the potential impact of union conduct on employers. *Florida Power & Light Co.*

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[3] Unlike amicus curiae AFL-CIO, which calls for a reexamination of the validity of *Oakland Mailers* (AFL-CIO Br. 4, 21-24), respondent does not "urge the Court to revisit that decision here" (Resp. Br. 34). Instead, respondent contends that "the theory the Board propounds in the instant case represents yet a further extension of *Oakland Mailers,* one not compelled by the decisions to this point" (*ibid.*).

v. *IBEW, Local 641,* 417 U.S. 790, 804-805 (1974); *American Broadcasting Cos.* v. *Writers Guild,* 437 U.S. 411, 424 (1978).

In *Florida Power,* the Court said that "[b]oth the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the *selection* of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances." 417 U.S. at 803 (emphasis added). And the Court assumed the validity of the Board's position in *Oakland Mailers* that Section 8(b)(1)(B) interdicts not only a union's direct economic pressure on an employer to replace its chosen collective bargaining or grievance adjustment representative, but also "a union's discipline of one of its members who is a supervisory employer * * * when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." 417 U.S. at 804-805. Despite respondent's suggestion to the contrary, all that the *Florida Power* Court found to be beyond the "metes and bounds" (*id.* at 798) of Section 8(b)(1)(B) was the Board's attempt in that case to prohibit union discipline of supervisor-members who had been fined for crossing picket lines *not* to engage in collective bargaining and grievance handling but to perform the rank-and-file work of striking employees.[4]

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[4] Amicus curiae AFL-CIO asserts (AFL-CIO Br. 9 & n. 2) that in *Florida Power* this Court rejected the reasoning of *Oakland Mailers.* But, as we have shown, in *Florida Power* the Court did not disapprove the proscription of indirect pressure, it disapproved only the Board's conclusion that Section 8(b)(1)(B) extends beyond protecting the collective bargaining and grievance adjusting functions specified in the section. Significantly, when this Court had occasion to describe *Florida Power* in *ABC,* the Court stated (437 U.S. at 425):

> Assuming without deciding that the Board's decision in *Oakland Mailers* fell within the outer reaches of Section 8(b)(1)(B), the Court concluded that [the Board decision in *Florida Power*] did

The reason why the Court rejected the Board's position in *Florida Power* has no bearing on the issue in this case. The Board's position in *Florida Power* was predicated on its concern that discipline of supervisor-members even for performing rank-and-file work would "deprive the employer of the full loyalty of those supervisors" (417 U.S. at 806). But the Court held that the problem of divided loyalty "is one that Congress addressed, not through § 8(b)(1)(B), but through a completely different legislative route," *i.e.,* by excluding supervisors "from the coverage of the Act" and thereby giving the employer "the right to refuse to hire union members as supervisors." 417 U.S. at 807-808 (footnote and citations omitted). In the present case, the Board is not attempting to insure the employer the undivided loyalty of his supervisors, but the right freely to select his representatives for grievance adjustment purposes—a right that *Florida Power* recognizes is clearly within the purview of Section 8(b)(1)(B).

In *ABC,* the Court again "declined the invitation to overrule *Oakland Mailers"* and reaffirmed that "Union pressure on supervisors can affect either their willingness to serve as grievance adjustors or collective bargainers, or the manner in which they fulfill these functions; and either effect impermissibly coerces the employer in his choice of representative." 437 U.S. at 436 (footnote omitted). The Court upheld the Board's finding that the union's discipline of supervisor-members performing their normal

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not, because it was 'certain that these supervisors were not engaged in collective bargaining or grievance adjustment, or in any activities related thereto, when they crossed union picket lines during an economic strike to engage in rank-and-file struck work.'

The Court added (437 U.S. at 429) that in *Florida Power* it had "expressly refrained from questioning * * * the proposition that an employer could be coerced or restrained within the meaning of Section 8(b)(1)(B) not only by picketing or other direct actions aimed at him but also by debilitatfng discipline imposed on his collective-bargaining or grievance adjustment representative."

supervisory duties (including grievance adjustment) during a strike had both of these impermissible effects.

b. Respondent concedes (Br. 15) that the reference in *ABC* to a supervisor's "willingness to serve" can be read to support the Board's position that union discipline of supervisor-members for serving as supervisors of a disfavored employer can violate Section 8(b)(1)(B). Respondent seeks to distinguish *ABC*, however, by asserting (Br. 15) that in that case the union had permitted its members to serve as management representatives and was seeking to use its continuing power over those members to regulate their conduct as management representatives. Respondent contends that union discipline affecting "willingness to serve" is unlawful only "where a union 'interfere[s] with the employer's control over his representatives' by disciplining individuals for their conduct *qua* management representatives" and *thereby* affects the union members' willingness to serve as grievance adjustors or collective bargainers (*id.* at 16).

There is, however, no indication that the Court intended its language in *ABC* to have the restricted meaning respondent suggests. To the contrary, as our opening brief explained (at 13), the Court cited with approval the Board's decision in *New Mexico District Council of Carpenters (A.S. Horner, Inc.)*, 177 N.L.R.B. 500 (1969), enforced, 454 F.2d 1116 (10th Cir. 1972), a case in which the union fined a supervisor-member with grievance handling functions because he worked for an employer that did not have a contract with the union. It is therefore clear that the Court viewed Section 8(b)(1)(B) as proscribing union discipline that deprives a disfavored employer of its chosen representatives even where that discipline is not part of an attempt to control the performance of the representatives. Indeed, the Court indicated that union discipline for the express purpose of causing the employer's chosen representatives for grievance adjustment or collective bargaining to be unwilling to serve in that capacity

at all—the situation in *Horner* and here—" 'falls close to the original rationale of Section 8(b)(1)(B) which was to permit the employer to keep the bargaining representative of his own choosing.' " *ABC*, 437 U.S. at 436 n. 36 (quoting *IBEW, Local 134* v. *NLRB*, 487 F.2d 1143, 1155 n.19 (D.C. Cir. 1973)).[5]

3. Just as there is no merit to respondent's effort to engraft novel limitations onto the statute, respondent is also incorrect in contending that the Board espouses an unbounded interpretation of Section 8(b)(1)(B). The Board's interpretation, would not, as respondent asserts (Br. 8), "prohibit all union conduct which affects the size of the pool from which an employer chooses his supervisors" nor does the Board propose to "make it unlawful for a union to limit its membership to rank-and-file workers and to exclude *all* supervisors from union membership (regardless of where the supervisor works)" (*id.* at 11). To the contrary, in *National Association of Letter Carriers*, 240 N.L.R.B. 519 (1979), the Board held that the union did not violate Section 8(b)(1)(B) by amending its constitution to render employees who accepted positions as temporary supervisors ineligible for membership so long as they worked in that capacity, even though the union's action caused "the pool of letter carriers available to serve as temporary supervisors [to be] diminished" (240 N.L.R.B. at 525). The Board explained that "[t]he fact that the Postal Service may have fewer letter carriers who are willing to serve as temporary supervisors as a result of the [union constitutional] amendment in no way affects the Postal Service's selection of *which* letter carrier will serve as a temporary supervisor (*ibid.* (emphasis in original)).

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[5] There is no merit to respondent's suggestion (Br. 15 n.9) that the Court's opinion in *ABC* should not be read as approving *Horner*. Respondent's view rests on the mistaken belief that in *ABC* the Court regarded Section 8(b)(1)(B) as restricted to proscribing union interference with employer *control* over management representatives.

In *Letter Carriers,* the Board expressly distinguished the cases that respondent claims (Br. 17) are in conflict with that case. In those cases,[6] the Board found violative of Section 8(b)(1)(B) union fines imposed on members who accepted or retained temporary supervisory positions when the union was disputing the employer's right to utilize temporary supervisors. In those cases, as here, the unions had no general rule against members serving as supervisors, but instead used their disciplinary power over members to further a dispute with a particular employer. As the Board explained in *Letter Carriers,* 240 N.L.R.B. at 525 & n.28, in those cases the unions attempted to "influence [the employers' supervisory] selection procedure" by prohibiting their members from accepting such positions, whereas in *Letter Carriers* the "decision to appoint an employee as a temporary supervisor, and the final decision to accept such an appointment, remains solely within the power of the Postal Service and the employee, respectively."

The Board's position that a union may violate Section 8(b)(1)(B) when it uses its disciplinary power over its members to affect an employer's selection of its representatives for grievance adjustment or collective bargaining does not mean that a union that believes it detrimental to its interests to have supervisors as members cannot promulgate a rule barring all supervisors from union membership. As the Board explained in a different context, in the latter situation, "[t]he primary relationship * * * affected [is] the one between the union and its members * * * and the union's particular objective * * * [is] deemed * * * a legitimate area for union concern * * *." *Oakland Mailers,* 172 N.L.R.B. at 2174. On the

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[6] *Teamsters Local 663*, 193 N.L.R.B. 581 (1971); *Communications Workers, Local 1122*, 226 N.L.R.B. 97 (1976), enforced, 562 F.2d 37 (2d Cir. 1977) (Table); *Systems Council T-6*, 236 N.L.R.B. 1209 (1978), enforced, 599 F.2d 5 (1st Cir. 1979).

other hand, where, as here, the union seeks to prevent a member from working as a grievance adjustor or collective bargainer for a particular employer, "the relationship primarily affected is the one between the Union and the Employer * * * " and "[t]he relationship between the Union and its members [is] only of secondary importance, used as a convenient and * * * powerful tool to affect the employer-union relationship." *Ibid.*

For these reasons, as well as those set forth in the Board's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1987

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40221

85 - 1924

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-9124

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This brief in support of Petitioner National Labor Relations Board is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Charles Fried, Solicitor General of the United States, Counsel for Petitioner and Lawrence Gold, counsel for Respondent. Letters of Consent from both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

The Sacramento Valley Chapter of National Electrical Contractors Association (NECA) is a multi-employer bargaining group comprised of electrical contractors working in and around the area of Sacramento, California. NECA has a long and sordid bargaining history with Respondent International Brotherhood of Electrical Workers, Local 340 (hereinafter referred to as the "Union" or "IBEW Local 340"). As a direct result of a dispute between NECA and Respondent, the Union fined Albert Schoux and James K. "Ted" Choate who were found to be potential and actual grievance adjustment and collective bargaining representatives of their respective employers, Royal Electric Company (hereinafter referred to as "Royal") and Harold E. Nutter Electric, Inc. (hereinafter referred to as "Nutter"). Therefore, Schoux, Choate, Royal, Nutter and NECA, the multi-employer bargaining group representative, each have a direct interest in the outcome of this case and ask to file this brief jointly as Amici Curiae. Amici also has knowledge of additional facts of which this Court should be aware. Amici submits this brief to apprise the Court of the full factual backdrop of this case.

SUMMARY OF ARGUMENT

Congress intended Section 8(b)(1)(B) of the National Labor Relations Act of 1947 as amended, 29 USC 158(b)(1)(B) (hereinafter referred to as the "Act" or the "NLRA") to protect employers from coercion in the selection of their bargaining representatives and to prevent employers from being pressured to join or resign from multi-employer groups. The National Labor Relations Board has developed reasonable standards for determining when Section 8(b)(1)(B) has been violated. The United States Court of Appeals for the Ninth Circuit refuses to follow those standards but insists upon an inquiry into union recognitional intent. Consideration of all the facts of this case reveals that the United States Court of Appeals for the Ninth Circuit's approach to implementing Section 8(b)(1)(B) is neither rationally derived from the statutory language, nor the Congressional intent behind Section 8(b)(1)(B). The three part test of the Ninth Circuit Court of Appeals is too illusive to be of practical value in labor disputes generally, and should not be adopted by this Court.

BACKGROUND

At the heart of this case is a labor dispute, a genuine struggle of real significance between actual people. NECA represents almost all the electrical contractors in the Sacramento area for collective bargaining purposes. Before 1981, the Union represented approximately 700 employees, most of whom worked for NECA member contractors. After 1981, and continuing to date, the National Association of Independent Unions ("NAIU") represents about 400 electricians working for these same contractors. The labor dispute in this case concerns the change in bargaining representative of approximately 400 electrical workers from IBEW Local 340 to NAIU.

NECA's bargaining relationship with the Union began almost 40 years ago and ended abruptly on September 15, 1981. In June of 1981, the then current contract between NECA and the Union expired and negotiations began. After negotiations failed to produce a new contract, the Union undertook a strike that lasted several months. The strike generated considerable litigation and finally ended when the Union sent NECA a

letter disclaiming any interest in representing the employees of NECA members. A copy of this September 15th letter of disclaimer is reprinted at Decision of the Administrative Law Judge, 271 NLRB at 996, Petition For A Writ of Certiorari at 12A.

The September 15th disclaimer letter did not mean the Union was going out of the business of representing electrical workers in the Sacramento area. When the Union could not settle with NECA, it decided to by-pass the employers' chosen bargaining representative, fragment the unit and bargain with the employers on an individual basis. Ten days after sending the disclaimer letter, the Union filed seventeen representation petitions in individual employer units. *See, Arden Electric*, 263 NLRB 318, 110 LRRM 1529 (1982), 275 NLRB No. 95, 119 LRRM, 1161 (1985). As dissenting members Jenkins and Hunter concluded in *Arden Electric*:

> The Board cannot, consistent with the line of cases outlined above, permit the Petitioner to succeed in this blatant attempt to whipsaw the unit. As the Petitioner's attempted withdrawal was untimely for the purpose of fragmenting the unit, we would affirm the Regional Director's administrative dismissal of the petitions.

Arden Electric, 263 NLRB at 319.

On October 1, 1981, NECA entered into a pre-hire contract with the NAIU, a rival labor organization. Because NECA's contract with the NAIU foiled the Union's plan to whipsaw the multi-employer bargaining unit, the Union launched extensive litigation in a variety of forums to crush the competing NECA/NAIU bargaining unit and/or to break off individual contractors "friendly" to the Union. NECA defended itself and continued to work with the NAIU, reaching several successive bargaining contracts over the five years since 1981. In *Grason Electric*, NLRB Case No. 20-CA-16872/JD-(SF)-190-83 (*filed* Jan. 28, 1982), Judge Pollack dismissed charges that Nutter and other NECA members unlawfully recognized the NAIU in the overall multi-employer unit. The *Grason* case is still pending as is much of the other litigation between the parties mentioned herein.

A. Proceedings In State Court

On June 25, 1981, three months prior to the signing of the contract between NECA and the NAIU, the Union launched its first legal attack with a state court action in Sacramento County Superior Court entitled *Frith v. Sacramento Valley Chapter, National*

Electrical Contractors Association, No. 297018 (California Superior Court for the County of Sacramento, *filed* June 25, 1981). The Union claimed that NECA had defamed the Union in a newspaper advertisement during the strike. This suit is still pending.

B. Proceedings Before The NLRB

The Union responded to the contract between NECA and the NAIU by filing a charge with the NLRB alleging that the collective bargaining agreement with the NAIU was illegal under Section 8(a)(1) and (2) of the Act. In essence, the Union asserted that NECA had unlawfully assisted the NAIU. After a full administrative hearing on August 31, 1983, NLRB Administrative Law Judge Jay Pollack found that NECA had engaged in an unfair labor practice by executing a collective bargaining agreement at a time when there was a question concerning representation only with respect to two small employers but *not* with respect to Nutter or the larger multi-employer group (which included Royal). One of these two small employers went out of business and the other voluntarily re-signed with IBEW Local 340, effectively mooting the case before a

final NLRB decision was rendered. Other than certain *de minimus* violations relating to dues deductions, the Administrative Law Judge dismissed the entire remainder of the Union's charges. The NLRB found no pre-contract assistance or domination. *Grason Electric, supra*. Exceptions to this order were filed by both the Union and NECA and the case is still pending. 1/

In another case, NECA was also forced to seek relief before the NLRB when the Union intentionally withheld supervisors from NECA members. In *Hulse Electric*, 273 NLRB 428, 118 LRRM 1604 (1984), Administrative Law Judge Pollack found that the Union had violated 8(b)(1)(B). *Hulse Electric* involved supervisory and non-supervisory employees of other NECA members who were fined by IBEW Local 340 for working during the 1981 strike. All the NLRB cases involving NECA and IBEW 340 were heard by Judge Pollack, who wrote the underlying opinion in this case as well.

1/ By letter dated October 9, 1986 to the NLRB Regional Attorney, the Union's Attorney sought dismissal of the *Grason* case. A copy of this letter is attached as Appendix A.

C. Proceedings In The Federal Courts

Faced with the severe economic harm wrought by the Union's strike for allegedly illegal contract clauses, NECA sought damages under Section 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187. *Sacramento Valley Chapter of the National Electrical Contractors Association v. International Brotherhood of Electrical Workers*, No. S-81-480 LKK, *portions reported at* 632 F.Supp. 1403 *and* 637 F.Supp. 1417 (E.D.Cal. 1986). The Union responded to this Section 303 action by filing a counterclaim in the consolidated cases of *Sacramento Area Electrical Workers Health & Welfare, Vacation & Pension Trust Funds v. Cal-Neva Electric, Inc.*, No. S-82-912 RAR, and *Sacramento Area Electrical Workers Health & Welfare, Vacation & Pension Trust Funds v. Tonelli Electric, Inc.*, No. 82-913 RAR, 99 Labor Cases (CCH) ¶10,649 (E.D. Cal. 1982), against a number of defendants, including NECA and the NAIU. The Union alleged violations of Section 302 of the LMRA, 29 U.S.C. § 186. Just as it did in the NLRB's *Grason* case, the Union again claimed that assistance had been given by NECA to the NAIU in return for a

"sweetheart" deal. On December 3, 1982, Judge Ramirez of the United States District Court for the Eastern District of California dismissed those complaints as "wholly preempted" by Section 8(a)(2) of the NLRA.

Undaunted, the Union next sought to re-cast its claim in the form of a violation of the antitrust laws and filed an antitrust counterclaim against NECA, Nutter and other NECA employer members in the above-mentioned Section 303 action. The Union's counter-claim was dismissed in its entirety as the court recognized it was nothing more than an "effort to redress the litigation posture, [for] unions have recently sought to find some ground upon which to cross-complain" in order to obtain leverage in settlement. *NECA v. IBEW, Local 340, supra*, 632 F.Supp at 1407. The dismissal was denominated as final pursuant to Federal Rules of Civil Procedure 59(b). *Id.* at 1414. The Union has appealed the dismissal to the United States Court of Appeals for the Ninth Circuit, Docket No. 86-2026.

After the failure of the antitrust action, the Union brought the same claim for the third time as a violation of the anti-racketeering statute. *International*

Brotherhood of Electrical Workers, Local 340 v. Mark R. Thierman, Sacramento Chapter of the National Electrical Contractors Association, et al., No. S-86-0881 LKK/JFM (E.D. Cal. *filed* July 23, 1986). The Union alleged the same "sweetheart" contract as a conspiracy to violate the Section 302 of the Act. The named conspirators are NECA, Nutter, its attorneys and serveral other NECA employer members. A motion to dismiss has been filed and is still pending in the United States District Court for the Eastern District of California. On the first page of the Union's Opposition to Defendant's Motion to Dismiss this action, dated November 7, 1986, IBEW Local 340 reveals, in no uncertain terms, its intentions in the Sacramento area:

> Since October 1981, these employers and the NAIU have negotiated 'sweetheart' contracts as part of a grand scheme of the employers to use the disguise of a legitimate labor union to claim that they were bound to a legitimate, arms-length collective bargaining agreement in the Sacramento area. In this manner, these employers could use this disguise as a sword to injure I.B.E.W. Local 340 and its members, as well as a shield to blunt any efforts by I.B.E.W. Local 340 *to organize the employees of the employers* or to sign individual collective bargaining agreements with one or more of these employers.

Brief of Plaintiff at 1, Case No. S-86-0881 LKK/JFM (E.D. Cal., July 23, 1986)(Emphasis added.)

In the Court of Appeals for the Ninth Circuit there is still pending a decision in the case of *Lud Larson, et al. v. Ken Carlson, et al., appeal docketed* No. 83-3359 (9th Cir., Aug. 31, 1986) on appeal from the United States District Court for the Eastern District of California, Civil Action No. S-83-385 EDP. This case involves the confirmation of an arbitration award dividing assets of the former NECA-IBEW Joint Apprenticeship Training Trust Fund between the IBEW Local 340/Sacramento Area Electrical Contractors Association ("SECA") Joint Apprenticeship Training Committee and the NECA/NAIU Joint Apprenticeship Training Committee. 2/ NLRB Administrative Law Judge Pollack was also made aware of the arbitration between the NECA trustees and IBEW Local 340 trustees arising out of the

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2/ As predicted in the testimony of IBEW 340 Business Agent Lee Frith before Administrative Law Judge Pollack, a "new" multi-employer association was created by IBEW Local 340 and former NECA contractors working in the area and named the Sacramento Area Electrical Contractors Association (SECA).

events of the strike in 1981. This arbitration is reported at 3 Employee Benefit Cases 2469 (1982). Royal and Nutter are both contributing employers to the NECA/NAIU trusts and were contributors to the IBEW Local 340/NECA trusts before their termination. At all times relevant herein, Royal and Nutter were represented by NECA and/or NECA management trustees in all labor relations and/or Trust Fund matters.

D. The Posture Of The Parties

The Sacramento electrical industry is torn between two factions, NECA/NAIU and IBEW/SECA. Each group is trying to pull employees into its respective camp. Each is using every means available to finesse itself into a slightly better position than the other. To say that one or the other does not "intend" to represent all the electrical workers in the area ignores reality. Each intends to represent all the electricians, and thereby put the other faction out of business or each intends to eliminate the other from competition and therby represent all the electricians in the Sacramento area.

ARGUMENT

A. A Union's "Intent To Represent" Is An Improper Test To Determine If 8(b)(1)(B) Has Been Violated

Congress has sought to create a uniform labor policy throughout this country. Administrative agencies serve Congress in developing and implementing a cohesive national labor policy pursuant to specific legislative acts. Because the NLRB was created to achieve this goal in the private sector, judicial review of its policy decisions and statutory interpretations should be strictly limited. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 98 S.Ct. 2467, 57 L.Ed.2d 370 (1978). Only if the NLRB's statutory construction is unreasonable, should enforcement be denied. The primary jurisdiction for labor relations under the National Labor Relations Act lies with the NLRB and not the Court of Appeals. If the NLR3's construction of the Act is "reasonably defensible, it should not be rejected merely because the court might prefer another view of the statute". *Ford Motor Co. v. NLRB*, 441 U.S. 488 at 497, 99 S.Ct. 1842 at 1849, 60 L.Ed.2d 420 at 428 (1979).

In Section 8(b)(1)(B) cases, the NLRB has formulated a two part test that is rationally derived from the language and the intent of the statute. The NLRB first determines if the employee subjected to some form of union pressure is a management representative. If the first element is satisfied, the NLRB inquires if the union pressure was coercive of the employer. If these two elements are met, the union pressure violates the Act. In the instant action, the NLRB concluded that both elements of the test were met. The United States Court of Appeals for the Ninth Circuit agreed that Choate and Schoux were management's collective bargaining representatives, and that the Union fines were coercive in the employer's selection of Choate and Schoux, but refused to enforce the NLRB's award.

The United States Court of Appeals for the Ninth Circuit has adopted the NLRB's two part test but has added a third element of its own creation. This "third" part to the test inquires "...whether the union demonstrated an intent to represent the employees of the nonsignatory employers ..." 780 F.2d at 1491. The United States Court of Appeals

for the Ninth Circuit requires the NLRB to prove the Union wishes to "represent" the employees of the employer when it fines supervisors for working for a "non-union" employer. This question is irrelevant to the language and purpose of Section 8(b)(1)(B).

The United States Court of Appeal for the Ninth Circuit first announced its new representational or recognitional "intent" inquiry in the decision of *NLRB v. IBEW Local 73 (Chewelah)*, 621 F.2d 1035, *modified* 714 F.2d 870 (1980). In *Chewelah*, the court considered a case factually similar to the instant case, where a union imposed a fine on a member who helped form and then went to work for a non-signatory company. The United States Court of Appeals for the Ninth Circuit reasoned that because the union had not manifested an intent to represent the employees of the new company, the fine was not intended to coerce an employer in the selection of its bargaining representatives. The NLRB refused to acquiesce and sought a Writ of Certiorari.

The fallacy of the holding in *Chewelah* is that it allows the union to do exactly that which the statute forbids. Section

8(b)(1)(B) says it shall be unlawful for a union to coerce an employer "... *in the selection* of its..." collective bargaining or grievance adjustment representative. By fining a supervisor who works for a non-union employer, the Union is attempting to coerce the employer (through the employee) to not select the Union trained employee as a supervisor. This action is coercive whether or not the union seeks representation. Although the statute does not mention the word "intent", the purpose of a union fine of a supervisor who works for a non-union employer is to influence that employer's selection of collective bargaining representative, and to force the employer to "go union" some day in order to obtain qualified union trained supervision. Why else would a union fine a supervisor member for working for a non-union employer?

The NLRB continues to reject the *Chewelah* "intent" inquiry. In *Local Union 497, International Brotherhood of Electrical Workers (Canyon Valley Electric)*, 281 NLRB No. 158, 123 LRRM 1160 (1986), the IBEW fined a supervisor for working for a non-signatory electrical contractor. In defense of the 8(b)(1)(B) charged leveled by the

NLRB, the IBEW relied on *Chewelah*, the governing law of the circuit in which the case arose. The IBEW argued that it neither has nor seeks a bargaining relationship with the supervisor's employer. The Board summarily rejected the *Chewelah* rationale. "Section 8(b)(1)(B) ... protects the freedom of employers to choose their representatives unimpeded by coercive union pressure *on the representatives* to cease working for them." 281 NLRB at ____, 123 LRRM at 1160 (emphasis added). Section 8(b)(1)(B) simply does not mention "recognition" as a prerequisite at all. In the instant case, the NLRB also dispensed with the Union's *Chewelah* argument as out of line with Supreme Court precedent.

The hard facts of life are that unions always seek eventually to represent all the employees in an area or an industry. Unions exist to organize the unorganized. *See, Carpenters Local Union No. 1622 (Paul E. Iacono Structural Engineer, Inc.)*, 250 NLRB 416 (1980). By denying non-union employers trained supervision, the Union hopes to induce the employers to sign an agreement. Especially in the construction industry where pre-hire agreements are lawful, control of selection of supervision is a

major factor in union organizing. In this case, IBEW Local 340 Business Agent Lee Frith testified that eventually the union wanted every electrical contractor in the Sacramento area signed to an IBEW 340 agreement. Decision of the Administrative Law Judge, 271 NLRB at 999, Petition For A Writ Of Certiorari at 33A. The Administrative Law Judge considered the fines illegal even under the United States Court of Appeals for the Ninth Circuit's test of Section 8(b)(1)(B).

The NLRB does not require a recognitional object because the statute does not require it. The NLRB has made a policy judgment about the nature and effect of such union fines upon the selection of supervisors. While a "recognitional object" exists *sub silentio* in all instances where a union fines a supervisor for working for a non-signatory employer, it would be unfair to the employer and its supervisors to be forced to prove the union's hidden agenda in each and every case.

The facts of this case demonstrate vividly that the NLRB's interpretation of Section 8(b)(1)(B) is correct. "The major concern of Congress [in enacting Section

8(b)(1)(B)] was to prevent unions from forcing employers into or out of multi-employer bargaining units". *Chewelah* 621 F.2d at 1036 citing *Florida Power & Light Co. v. International Brotherhood of Electrical Workers*, 417 U.S. 790, 803, 94 S.Ct. 2737, 2743, 41 L.Ed.2d 477 (1974).

In the instant case, the Union insisted to impasse on allegedly illegal topics of bargaining and then, rather than drop its bargaining demands "disclaimed interest" in representing the employees of the employers of the multi-employer association. Decision of the Administrative Law Judge, 271 NLRB at 999. Both Nutter Electric and Royal Electric were NECA bargaining unit members. At the same time, the union filed selective individual petitions for representation in single employer units, with the expressed desire of forcing all the employers out of the multi-employer association and eventually into a new, union dominated association, Petition For A Writ of Certiorari at 33A. As the union's attorney wrote:

> Although I was not asked to express an opinion as to the wisdom of disclaiming interest, it is my opinion that it was a realistic move to make considering the tactics employed by NECA [assisting its members in hiring replacement employees] and the possibility that the disclaimer

> would prompt the good contractors into action. I further advised Brother Frith [Business Agent for the Union] that the disclaimer would permit the individual employers to grant recognition to Local 340 on an individual basis and to bargain on a single employer basis.

Decision of the Administrative Law Judge, 271 NLRB at 999, Petition For A Writ Of Certiorari at 24A.

This case epitomizes the legislative intent behind Section 8(b)(1)(B). Because Nutter and Royal remained loyal to the multi-employer group (NECA) and signed a contract with a competitor union (the NAIU), IBEW Local 340 sought to deprive these employers of their union trained supervision. 3/ As the Administrative Law Judge continues:

> In the instant hearing [Union Business Agent] Frith, called as an adverse witness by counsel for Nutter Electric and Royal Electric, testified

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3/ Judge Pollack adopting his conclusion from *Hulse*, stated,

> "In that case, I found that the Union intended to withhold supervision in order to force the employers to come back to the union. The union would then be in a position to bargain with the employers on an individual basis rather than on a NECA multi-employer basis."

Decision of the Administrative Law Judge 271, NLRB at 1000, Petition For A Writ Of Certiorari at 33A.

> that after the disclaimer it was his intention to organize every electrical contractor that was willing to sign an agreement with the Union. Frith further testified that it was the Union's first concern to organize the 17 employers for which petitions were filed and get an agreement and an association established before any plans were made to organize the other employers. According to Frith, after a new association was formed with the 17 employers, any other employer that was willing to become a part of the new organization would be welcome. Frith testified "ultimately down the road it was our hope that everybody would be back under an agreement.

Decision of the Administrative Law Judge, 271 NLRB at 999, Petition For A Writ Of Certiorari at 24A.

The United States Court of Appeals for the Eleventh Circuit correctly supports the NLRB's reasoning in these kinds of cases. In *National Labor Relations Board v. International Brotherhood of Electrical Workers (Willey)*, 703 F.2d 501, 113 LRRM 2226 (11th Cir., 1983) the court expressly rejected *Chewelah*. The court in *Willey* reasoned that "[p]lacing the emphasis on the effect caused by union's actions, rather than its intent, is more consistent with the fundamental purposes of the statute." *Willey*, 703 F.2d at 5067. As an organization, the union must be presumed to "intend" the logical result of its actions. Subjective, individual "intent" is just not

appropriate to analyzing the behavior of a large collective organization.

This Court also focuses on the affect of the action rather than the union's intent. "[The Board] may -- indeed, it must -- inquire whether the sanction may adversely affect the supervisor's performance of his collective-bargaining or grievance-adjustment tasks and thereby coerce or restrain the employer contrary to §8(b)(1)(B)." *American Broadcasting Co. v. Writer's Guild of America, West, Inc.*, 437 U.S. 411 at 430, 98 S.Ct. 2423 at 2434, 57 L.Ed.2d 313 at 328 (1978) *and see Florida Power and Light Co. v. International Brotherhood of Electrical Workers*, 417 U.S. 790 at 804-805, 94 S.Ct. 2737 at 2744-45, 41 L.Ed.2d 477 at 488 (1974). But the "intent" of the union must be presumed from the obvious result of its action and is totally irrelevant to meaningful application of the Act.

B. Intent Is Too Illusive A Touchstone To Be Used Here.

Despite overwhelming factual indications that the Union was attempting to deprive Nutter and Royal of union-trained supervision in an effort to force these

employers out of the NECA multi-employer bargaining group and into bargaining on a single employer or a new multi-employer group basis, the United States Court of Appeal for the Ninth Circuit found that the Administrative Law Judge "did not have sufficient evidence to support his conclusion about the Union's intent to represent" (780 F.2d at 1493). If the evidence of intent to influence the bargaining representative in this case does not support the ALJ's finding as reasonable, no finding of intent will ever be reasonable to prove an 8(b)(1)(B) violation. In the real world, business agents never actually admit an 8(b)(1)(B) "recognitional" intent. The Administrative Law Judge perceived ample evidence of intent here. The United States Court of Appeal for the Ninth Circuit's contrary finding demonstrates that intent of a "recognitional" object is not the proper standard in an 8(b)(1)(B) context.

Pointing to the *Hulse*, *Grason* and *Arden* cases and the testimony of Lee Frith, the ALJ found that the Union continued in its desire to influence the collective bargaining representative of the employers of the NECA multi-employer association, "albeit not

in the NECA multi-employer unit." Decision of the Administrative Law Judge, 271 NLRB at 1002, Petition For A Writ of Certiorari at 33A. Deference should be given to the Adminestrative Law Judge on all factual inferences. An administrative law judge hearing live testimony may reasonably find that the requisite intent is present. An appeals court without the aid of weighing credibility by witness demeanor or other non-verbal signs is not really in a position to judge such an illusive quality as "intent". Under these circumstances, the trier of fact's determination of intent as an issue of fact should be virtually non-reviewable. By reversing the finding of fact of Administrative Law Judge Pollack in such an obvious case as this one, the United States Court of Appeals for Ninth Circuit demonstrates conclusively that inquiry into the Union's "recognitional intent" is an unworkable standard for administering Section 8(b)(1)(b) of the Act.

CONCLUSION

The National Labor Relations Board has adopted a sound policy in its field of expertise by not requiring a "recognitional object" in proving an 8(b)(1)(B) violation.

This policy is initially derived from the statute and shaped through actual administration in the field. The paramount Congressional concern for establishing a uniform nationwide labor policy, administered primarily by the National Labor Relations Board, requires Court of Appeals to enforce an NLRB award that is not inconsistent with a rationale interpretation of statutory authority.

The full story behind this case reveals a clear intent by the Union to represent the employees of all NECA employers but not in the NECA multi-employer bargaining unit. Congress intended Section 8(b)(1)(B) to protect employers from being coerced in the selection of their bargaining representatives, especially when that pressure is designed to force the employer either into or out of multi-employer groups. In this case, the fines were part of an overall strategy to force the "good" employers out of NECA and "to bargain on a single employer basis".

The United States Court of Appeals for the Ninth Circuit failed to find substantial evidence of a "recognitional" intent because the nature of an intent inquiry is too

illusive to be practical. The "intent" of fining a supervisor member who works for a non-signatory employer is to influence the selection of that employer's supervisors and to force the employer to become signatory. While IBEW Local 340's attorneys deny any "recognitional" object before the NLRB, IBEW Local 340 seeks to upset the NECA-NAIU contract in lower courts and "to organize the employees of these employers or to sign individual bargaining agreements with one or more of these employers". IBEW Local 340's Brief In Opposition to Motion to Dismiss dated November 7, 1986 in *IBEW Local 340 v. Thierman, et al., supra.* Amici respectfully submit that the decision of the United States Court of Appeals for the Ninth Circuit should be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

Mark R. Thierman

Attorney for Amicus Curiae and Charging Parties before the National Labor Relations Board

APPENDIX A

October 9, 1986

Robert H. Miller
Regional Director
Region 20
National Labor Relations Board
450 Golden Gate Ave., Box 36047
San Francisco, CA 94102

Re: Grason Electric
Case No. 20-CA-16872

Dear Mr. Miller:

On behalf of IBEW Local 340, the charging party in the above referenced case, I hereby request that Region 20, as Counsel for the General Counsel, join with IBEW Local 340 in a motion to the Board to permit withdrawal of the unfair labor practice charge(s), followed by the withdrawal of the complaint and the discontinuance of this action. This motion will be made on the basis that the relief provided by the Board's ruling in Arden Electric, et al., 275 NLRB No. 95, 119 LRRM 1161 (June 4, 1985) has essentially mooted the Grason Electric case.

The decision in Arden reversed the Acting Regional Director's 29 December 1981 dismissal of IBEW Local 340's seventeen representation petitions filed on 25 September 1981. These petitions were

remanded to the Regional Director for further appropriate action.

This further appropriate action consisted of obtaining stipulations for elections, and/or holding additional hearings followed by the direction and conducting of elections. Only recently, the last of these seventeen representation petitions was finally processed through to conclusion. Although IBEW Local 340 has been denied timely justice in this case and the employees have been denied the right, since 1981, to freely express their choice concerning representation, what's done is done. There is nothing more to be gained in spending further time and money litigating the Grason case.

Counsel for the General Counsel chose only to litigate the complaint in Grason on the limited theory of Midwest Piping and Supply Co., 63 NLRB 1060 (1945), as modified in Abraham Grossman d/b/a Bruckner Nursing Home, 262 NLRB No. 115 (1982) and RCA del Caribe, Inc., 262 NLRB No. 116 (1982). This approach was taken, despite the fact that the unfair labor practice charge encompassed the 8(a)(2) allegation of unlawful domination and recognition of the

NAIU under circumstances not privileged by Section 8(f) of the Act. Although ample evidence substantiating this charge was available, and additional proof incidentally developed at the hearings, IBEW Local 340 was precluded from seeking to void the NAIU contract with NECA on this theory.

Because I do not have confidence that the theory advanced by the Counsel for the General Counsel at the Grason hearings will result in voiding the unlawful NECA-NAIU contract except as to the seventeen petitioned for employers, and since this voiding has already occurred as part of the Arden decision, I see no purpose to be served in continuing the Grason litigation.

If you agree with this request, please contact me immediately so that the necessary steps can be taken to cancel the Grason proceedings. I will assume that such a motion must come from the Counsel for the General Counsel, as he/she is invested with the prosecutorial discretion and control over this case. IBEW Local 340 will join/consent in this motion.

Very truly yours,

WYLIE, BLUNT, McBRIDE,
JESINGER & SURE
/s/
By Robert E. Jesinger

Supreme Court, U.S.
FILED
DEC 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1924

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 91 national and international unions representing approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties pursuant to Rule 36.2 of the Rules of this Court.

ARGUMENT

Introduction and Summary

Under § 8(b)(1)(B) of the National Labor Relations Act, as amended, 29 U.S.C., § 158(b)(1)(B) ("NLRA" or "the Act"), it is an unfair labor practice for a union to "restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." In this case the National Labor Relations Board

("NLRB" or "the Board") held that Local 340, International Brotherhood of Electrical Workers ("the Union") violated this prohibition by fining two union members for working in a grievance-adjusting capacity for employers with whom the Union does not have a collective bargaining relationship.

The Board's holding necessarily rests on two premises: first that § 8(b)(1)(B) proscribes not only *direct* union economic pressure on an employer to influence the employer's choice of his representatives but also union conduct which may *indirectly* affect an employer's choice of representatives; and second, that this prohibition extends to union actions whose sole purpose and effect is to discourage union members from accepting positions as management representatives. The brief of the respondent Union assumes the validity of the Board's first premise and demonstrates that, even on that assumption, the second premise is unsound and led the Board to an erroneous decision in this case. The AFL-CIO submits this brief *amicus curiae* because, although we agree with the Union's argument, in our view the Board's fundamental error lies in its first premise.

The "indirect coercion" doctrine was first announced by the Board two decades after § 8(b)(1)(B) was enacted, in *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications, Inc.)*, 172 NLRB 2173 (1968). The theory of that decision—and the doctrine to which it has given rise—is that: a purpose of § 8(b)(1)(B) is to protect an employer's control over its representatives and that union enforcement of union rules that place obligations on supervisor-members that conflict with the employer's roles therefore violate § 8(b)(1)(B). Pp. 5-7 *infra*.

In *Florida Power & Light v. Electrical Workers*, 417 U.S. 790 (1974) ("*FP&L*"), this Court squarely rejected that understanding of § 8(b)(1)(B). The Court there reasoned that although the Board's interest in assuring employers the undivided loyalty of their super-

visors "is a very real one, the problem is one that Congress addressed, not through § 8(b)(1)(B) but through a completely different legislative route." *Id.* at 807. The Court explained that Congress' solution to that problem was to enact §§ 2(3) and 14(a) of the NLRA which remove supervisors from the definition of "employee" and thereby enable an employer "to demand absolute loyalty from his supervisory personnel by insisting on pain of discharge, that they neither participate in, nor retain membership in, a labor organization." Pp. 7-9 *infra*.

The reasoning of *FP&L* is supported by both the statutory text and its legislative history.

The words of § 8(b)(1)(B), which make it an unfair labor practice for a union "to restrain or coerce . . . (B) an employer in the selection of his representatives . . .," do not naturally suggest a statutory protection of an employer's right to control the representatives the employer has selected. Indeed, in light of the employer's freedom to require its representatives not to associate with a union, the only respect in which union discipline of its members can even affect an employer's "selection of his representatives" by requiring the employer to decide whether he wishes to allow an individual who highly values union membership to serve as his representative. But to conclude that because the employer is put to that choice—free from any union pressure as to which decision he makes—the employer is subject to "restrain[t] or coerc[ion] . . . in the selection of his representatives" strains the statutory language beyond the breaking point. Pp. 9-12 *infra*.

The legislative history compels the same conclusion. It is clear from the evolution of §§ 2(3) and 14(a) that those sections were intended by Congress as a complete solution to the problem of a supervisor-member's conflict of loyalties between his employer and his union. And the legislative history of § 8(b)(1)(B) makes plain that that section was not intended to provide employers with addi-

tional protection in this regard; to the contrary, § 8(b)(1)(B) consistently was described as a narrow provision addressed to direct union pressure being placed on the employer, especially in the context of union attempts to force an employer to bargain through a multiemployer association.

Indeed, to treat § 8(b)(1)(B) as protecting an employer's control over his representatives, as *Oakland Mailers* does, is to ignore: the origins of that section and the political context in which it was enacted; the congressional judgment that underlies §§ 2(3) and 14(a), *viz.*, that divided loyalties are inevitable when union members hold supervisory posts and that the proper solution is to free employers to require supervisors to surrender any union membership; and the congressional policy manifested elsewhere in the Act of avoiding interference in internal union affairs. Pp. 13-21 *infra*.

We recognize, of course, that in *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, 437 (1978) (*"ABC"*), this Court, in a 5-4 decision, approved the application of § 8(b)(1)(B) to union discipline of supervisor-members, stating that it was "not prepared at this juncture to override" *Oakland Mailers*. The Court did so, in large measure, based on its earlier decision in *FP&L* where the Court had found that the discipline involved in that case did *not* violate § 8(b)(1)(B) but had "assumed without deciding" the validity of other aspects of the *Oakland Mailers* doctrine.

As Justice Stewart, the author of *FP&L* demonstrated in his dissent in *ABC*, *FP&L*'s reasoning cannot be squared with that of *Oakland Mailers*. Yet the Court in *ABC* did not begin from *FP&L*'s logic nor did the *ABC* Court pause to ascertain whether the Board's view comports with the language and legislative history of § 8(b)(1)(B). We therefore respectfully urge the Court to take this occasion to follow the sound premise of *FP&L* and to reject *Oakland Mailers*' unsound reading of § 8(b)(1)(B). Pp. 21-24 *infra*.

Section 8(b)(1)(B) Prohibits Only That Union Conduct Which Directly Pressures an Employer With Respect to the Employer's Choice of His Bargaining or Grievance-Adjusting Representatives.

A. As the NLRB acknowledges in its brief, for the first two decades after it was enacted, § 8(b)(1)(B) was understood by the Board "to prohibit only direct union pressure designed to compel an employer to replace its chosen representative." NLRB Br. at 10 n.3. In *San Francisco-Oakland Mailers*, *supra*, 172 NLRB 2173, however, the Board held that a union violates § 8(b)(1)(B) by disciplining a union member who also serves as a representative of the employer for the manner in which that individual performs his duties as a grievance-adjuster. The Board reasoned that by attempting to "compel the employer's foremen to take prounion positions in interpreting the collective bargaining agreement," the union was "interfering with the [employer's] control over its representatives" and that as a result, "the Employer would have to replace its foremen or face *de facto* nonrepresentation by them"; the Board viewed this as "indirect[]" restraint or coercion of the employer in the selection of his representative. 172 NLRB at 2173-74.

Since *Oakland Mailers*, the Board has continued to interpret § 8(b)(1)(B) to protect an employer's "control over its representatives" and to proscribe any union actions that "interfere with" such control. That understanding of § 8(b)(1)(B) lies at the heart of the "indirect coercion" doctrine that the Board here champions. But as we proceed to show, the Board's interpretation of § 8(b)(1)(B) was rejected in principle by this Court in *Florida Power & Light*, *supra*, 417 U.S. 790, and is inconsistent with the statutory text and its legislative history.

B. In *FP&L* the Court reviewed two NLRB decisions in which unions were found to have violated § 8(b)(1)(B) by disciplining supervisor-members for performing rank-and-file work during the course of a strike against the supervisors' employers, *IBEW System Council U-4 (Florida Power & Light Co.)*, 193 NLRB 30 (1971). *IBEW and Local 134 (Illinois Bell)*, 192 NLRB 85 (1971); both of those cases were decided by the Board on the basis of its holding in the lead case of *IBEW Local 2150 (Wisconsin Electric Power Co.)*, 192 NLRB 77 (1971), *enf'd*, 486 F.2d 602 (7th Cir. 1973), *vacated*, 418 U.S. 902. In *Wisconsin Electric*, the Board had reasoned that, as interpreted in *Oakland Mailers*, § 8(b)(1)(B) establishes a "'general prohibition'" on any union discipline which "'deprives the employer of the undivided loyalty of the supervisor to which it is entitled,'" 192 NLRB at 78, and that disciplining a supervisor-member for working during a strike violates this prohibition:

> The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective bargaining agents or to act for it in adjusting grievances. [*Id.*]

And in *Florida Power* the Board summarized its reasoning as follows:

> The Board in *Wisconsin Electric Power* found that the fines there struck at the loyalty an employer should be able to expect from its representatives for the adjustment of grievances and therefore restrained and coerced employers in their selection of

> such representative. We reach the same conclusion here. [193 NLRB at 31]

The *Florida Power* and *Illinois Bell* cases were consolidated for decision by the United States Court of Appeals for the District of Columbia Circuit which denied enforcement of the Board's orders. 487 F.2d 1143. This Court issued a writ of certiorari and affirmed that court's decision.

In doing so, the Court did not dispute the factual assumptions underlying the Board's decisions: that, as explicated by the Board in its brief to this Court, the " 'likely effect' " of permitting unions to discipline supervisor-members for reporting to work " 'is to make [the supervisor] subservient to the union's wishes when he performs [supervisory] functions in the future' " or at least " 'to deprive the employer of the full allegiance of, and control over a representative he has selected for grievance adjustment or collective bargaining purposes.' " 417 U.S. at 807, *quoting* NLRB Br. in No. 73-795, p. 34. Apparently referring to *Oakland Mailers*, the Court stated that "it is precisely that concern that is reflected in . . . recent decisions of the Board holding that [§ 8(b)(1)(B)] . . . may properly be read to encompass any situation in which the union's actions are likely to deprive the employer of the undivided loyalty of his supervisory employees." 417 U.S. at 806. But although acknowledging that "[t]he concern expressed in the argument is a very real one," the Court concluded "*the problem is one that Congress addressed not through § 8(b)(1)(B), but through a completely different legislative route.*" *Id.* at 807 (emphasis added).[1] Writing for the Court, Justice Stewart explained:

> Specifically, Congress in 1947 amended the definition of employee in § 2(3), 29 U.S.C. § 152(3), to

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[1] *See also FP&L*, 417 U.S. at 811 ("the conflict of loyalties problem that the Board has sought to reach under § 8(b)(1)(B) was intended by Congress to be dealt with in a very different fashion").

exclude those denominated supervisors under § 2(11), thereby excluding them from the coverage of the Act. Further, Congress enacted § 14(a), 29 U.S.C. § 164(a), explicitly providing:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Thus, while supervisors are permitted to become union members, Congress sought to assure the employer of the loyalty of his supervisors by reserving in him the right to refuse to hire union members as supervisors, the right to discharge such supervisors because of their involvement in union activities or union membership, and the right to refuse to engage in collective bargaining with them. [*Id.* at 807-08; citations omitted]

Justice Stewart went on to review the legislative history of § 2(3) and § 14(a) in order to demonstrate that "Congress' dominant purpose in [enacting those provisions] was to redress a perceived imbalance in labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests." *Id.* at 811. The Court also examined the legislative history of § 8(b)(1)(B) and found that "[t]he specific concern of Congress was to prevent unions from trying to force employers into or out of multiemployer bargaining units." *Id.* at 803. Based on this review of those materials Justice Stewart concluded:

> Congress' solution [to the problem of conflicting loyalties] was essentially one of providing the employer with an option. On the one hand, he is at liberty to demand absolute loyalty from his super-

> visory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor organization. Alternatively, an employer who wishes to do so, can permit his supervisors to join or retain their membership in labor unions, resolving such conflicts as arise through the traditional procedures of collective bargaining. But it is quite apparent, given the statutory language and the particular concerns that the legislative history shows what motivated Congress to enact § 8(b)(1)(B), that it did not intend to make *that* provision any part of the solution to the general problem of supervisor-member conflict of loyalties. [*Id.* at 812-13; emphasis in original] [2]

C. The conclusion the Court reached in *FP&L*—that § 8(b)(1)(B) is not "any part of the solution to the general problem of supervisor-member conflict of loyalties"—is confirmed by the statutory language and its legislative history. And those materials compel the further conclusion—to which the analysis of *FP&L* clearly points—that § 8(b)(1)(B) prohibits only *direct* and not "*indirect*" coercion of employers.

1. We start, of course, with the statutory text. Section 8(b)(1) provides:

> It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce

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[2] Although *FP&L* squarely rejected the *reasoning* of *Oakland Mailers*, the Court in *FP&L* refrained from deciding whether the actual holding of *Oakland Mailers* was erroneous; it was enough for the *FP&L* Court that, unlike *Oakland Mailers*, the supervisors in *FP&L* were being disciplined for performing rank-and-file work and not for the manner in which they had performed supervisory duties. *See* 417 U.S. at 804-05 ("assum[ing] without deciding that the Board's *Oakland Mailers* decision fell within the outer limits of the statute" and distinguishing that decision from *FP&L*); *see also id.* at 798 (suggesting that *Oakland Mailers* stretches § 8(b)(1)(B) beyond "the metes and bounds of the statutory language"); *ABC*, 437 U.S. at 442 n.5 (Stewart, J., dissenting) ("adher[ing] to the view expressed by the Court in *FP&L* that [*Oakland Mailers*] is at best within the 'outer limits' of § 8(b)(1)(B)").

> (A) employees in the exercise of the rights guaranteed in section 7 . . . or (B) and employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

The most natural reading of these words is that subsection (A) addresses union conduct directed at *employees* and subsection (B) addresses union conduct directed at *employers*. Plainly, when a union wages a strike or exerts other economic pressure against an employer to secure the appointment or the removal of a particular employer representative, the union is "restrain[ing] or coerc[ing] . . . an employer in the selection of his representatives." Such union conduct "clearly fall[s] within the metes and bounds of the statutory language." *FP&L*, 417 U.S. at 798.

The words of § 8(b)(1)(B) do not, however, naturally suggest a statutory protection of an employer's right to control his representative nor do these words naturally suggest a limitation on a union's power to discipline a union member whom an employer voluntarily chooses as his representative. While such discipline arguably can be seen to restrain or coerce the *union member*,[3] it

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[3] Given that union membership under the NLRA has been construed to be purely voluntary—no one can be required to join a union, *cf. NLRB v. General Motors*, 373 U.S. 734 (1963), and one who joins is free to leave the union at any time, *see Pattern Makers v. NLRB*, —— U.S. ——, 53 L.W. 4928 (June 27, 1985)—it is far from clear that requiring one who chooses to join and remain a member of a union to fulfill the obligations of membership that the individual voluntarily assumes can be considered to "restrain or coerce" the union member. In *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), *Scofield v. NLRB*, 394 U.S. 423 (1969), and *NLRB v. Boeing Co.*, 412 U.S. 67 (1972), the Court concluded that union fines of union members who had refrained from participating in concerted union activities did *not* restrain or coerce those members (and hence did not violate § 8(b)(1)(A)) notwithstanding the fact that in those cases the members were fined for exercising § 7

is difficult, if not impossible, to fit the union's conduct into the "metes and bounds" of § 8(b)(1)(B) which protects an employer from restraint or coercion in selecting his representative. Whatever the impact of union discipline on union members, the employer retains an unfettered choice—free from any union pressure—to decide whether he wishes a union member who is subject to the demands the union makes on union members to serve as the employer's representative.

Finding in § 8(b)(1)(B) a prohibition on union discipline of supervisor-members is even more difficult when the other provisions of the LMRA on which the Court relied in *FP&L*—specifically §§ 2(3) and 14(a)—are considered. The first of those sections provides that the term "employee" as used in the Act "shall not include . . . any individual employed as a supervisor"; the second states that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either

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rights). But in *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968), the Court ruled that a union violated § 8(b)(1)(A) by fining a union member for filing an unfair labor practice charge against the union.

Marine & Shipbuilding Workers was decided long before this Court in *Pattern Makers* held that union members have the right to resign at any time—and at a time when the governing assumption seems to have been to the contrary. *See ABC*, 437 U.S. at 436 (assuming validity of rule restricting membership resignation). Because that is so—and because the decision in *Marine & Shipbuilding Workers* has the anomalous result of requiring the NLRB and the Courts to "focus on the legitimacy of the union interest vindicated by [a union] rule" in order to decide whether the enforcement of that rule restrains or coerces union members, *Scofield v. NLRB*, *supra*, 394 U.S. at 431—we believe that in an appropriate case the vitality of *Marine & Shipbuilding Workers* should be reconsidered in light of *Pattern Makers*. The issue is not raised in the instant case, however, as the question here is whether the union's discipline restrained or coerced the employer in the selection of its representatives.

national or local, relating to collective bargaining." As a consequence of these provisions, an employer "is at liberty to . . . insist[], on pain of discharge that [its supervisors] neither participate in, nor retain membership in a labor organization." *FP&L*, 417 U.S. at 812. And given that freedom, it is simply not true, as the Board claimed in *Oakland Mailers*, that if unions were permitted to discipline supervisor-members, "[r]ealistically, the Employer would have to replace its foremen or face *de facto* nonrepresentation by them." P. 5 *supra*. Under §§ 2(3) and 14(a), a *third* option, not taken into account by the Board, is open to the employer, one that allows the employer to choose whomever he wants to be his representative without fear of divided loyalty: *the employer is left free by the law to insist that his supervisors not associate with a union.*

In light of the foregoing, the *only* respect in which union discipline can be said to affect an employer's "selection of his representatives" is that, with respect to an individual who values union membership more than a position as an employer representative that requires renunciation of union membership, the employer is put to the choice of deciding whether he wishes to allow such an individual to serve as a supervisor and to retain union membership. But to conclude that because the employer is put to that choice—free from any union pressure on the employer as to *which* decision he makes—the employer is subject to "restrain[t] or coerc[ion] . . . in the selection of his representatives" strains the statutory language beyond the breaking point. And to read § 8(b)(1)(B) as saving the employer from that choice—as assuring the employer that if he hires as his representative a union member who maintains his union membership, that individual will not owe conflicting obligations to the union—is to give § 8(b)(1)(B) a meaning not remotely suggested by its words.

2. The legislative history of the Labor Management Relations Act of 1947 ("LMRA"), like the language of § 8(b)(1)(B), cuts deeply against the Board's theory.

The legislative materials pertaining to the development of § 8(b)(1)(B) are set forth at length in the brief of the respondent Union in this case; we shall not burden the Court by reviewing these materials a second time. But before discussing the significance of those materials to *Oakland Mailers'* theory of § 8(b)(1)(B), we first pause to review the evolution of §§ 2(3) and 14(a) of the LMRA because, as this Court recognized in *FP&L*, those sections, and their legislative history, throw a cross light on the meaning of § 8(b)(1)(B).

(a) The legislative history of §§ 2(3) and 14(a) begins in 1946, when the NLRB, in *Packard Motor Car Co.*, 61 NLRB 4 (1945), *aff'd* 330 U.S. 485 (1947), overruled several prior decisions and held that supervisors were employees within the meaning of the Wagner Act and thus had the right to form a union and bargain collectively with their employer. Almost immediately efforts began in Congress to overrule that decision.

In the House, the first serious attempt to overrule *Packard Motor* came in the form of the Case bill, H.R. 5262, 79th Cong 2d Sess (1946), which was offered, 92 Cong. Rec. 836-38, and adopted, *id.* at 1027, 1067-70, on the floor of the House as a substitute for a labor law bill which the House Labor Committee had reported, H.R. 4908, 79th Cong., 2d Sess. (1946).[4] Section 12 of the Case bill provided that "no supervisory employee shall have the status of an employee for the purpose of sections 7, 8 and 9 of the National Labor Relations Act." Representative Case stated the theory of this section of the bill as follows: "No man can serve two masters. . . . That is all

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[4] The Labor Committee's bill was one President Truman had requested to provide for a fact-finding process and cooling-off period in labor disputes vitally affecting the public interest. *See* H.R. Rep. No. 1493, 79th Cong. 2d Sess. (1946).

that is involved here." 92 Cong. Rec. 5390. Significantly, the Case bill did not include an analogue to § 8(b)(1)(B).

After the Case bill passed the House, the Senate Labor Committee took up the bill. That Committee reported out a bill which did not include any provision addressed to the supervisor issue. *See* S. Rep. 1177, 79th Cong. 2d Sess. (1946). But in a dissenting statement, Senator Ball, writing for himself, Senator Taft and Senator Smith, urged adoption of an amendment to deny supervisors any "rights as an 'employee'" under the NLRA; Senator Ball stated that this proposal was designed to "meet this issue in a practical and realistic manner," and explained the basis for his proposal as follows:

> Foremen now occupy an anomalous position under the National Labor Relations Act. They are both management and labor or sometimes one and sometimes the other, without regard to the conflict inherent in such a situation.
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> * * * *
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> The NLRB has found regularly that there can be no true collective bargaining if management interferes with the designation of the bargaining agent of the workers. It is equally true that there can be no effective collective bargaining if the agent of the workers interferes with the personnel which, as a part of management, carries out the orders of management and exercises control over production, discipline, and the administration of the labor contract. The capture of the element of management, and the compromising or impairment of the undivided loyalty of any element of management, by a labor organization is an interference with the function of management. [S. Rep. 1177, *supra*, Pt. 2, at 19.]

Like the Case bill, Senator Ball's proposed amendment did not include any provision comparable to § 8(b)(1)(B).

When the Labor Committee's bill was debated on the floor of the Senate, Senator Ellender offered as an amendment a variant of the Ball proposal to remove supervisors from the NLRA; that amendment, too, did not contain an analogue to § 8(b)(1)(B). 92 Cong. Rec. 5698. Senator Ellender explained that his amendment was "an essential one" which would rectify "the anomalous situation of having a Federal statute which was enacted primarily for the benefit of the workers being construed so as to permit unions which already represent the workers to become also the legal representatives of the very men whom management has hired to supervise the rank and file." *Id.* The Ellender amendment was agreed to by the Senate by a vote of 43-30, *id.* at 5705,[5] and with this and other amendments, the Case bill was approved by the Senate, *id.* at 5739, in a form to which the House acceded, *id.* at 5946. President Truman vetoed the bill, however, and the House failed to override that veto. *Id.* at 6674-78.

The following year, early in the session of the Eightieth Congress, the House Labor Committee reported out the Hartley bill; like the Case bill and Ball and Ellender amendments, the Hartley bill excluded "supervisors" from the NLRA's definition of "employee" and did not include any provision similar to § 8(b)(1)(B). H.R. 3020, § 2(13), 80th Cong. 1st Sess. 1947), *reprinted in* 1 Legislative History of the Labor Managment Relations Act of 1947 at 34 (hereinafter "Leg. Hist.").[6] The House Committee stated that the status of supervisors

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[5] Significantly, in light of the fact that he later authored § 8(b)(1)(B), Senator Morse voted against the Ellender amendment. 92 Cong. Rec. 5705.

[6] The Hartley bill had a sweeping definition of "supervisor" which included anyone 'who is employed to act . . . for the employer in dealing with other individuals employed by the employer" and anyone who receives information "that is not available to the public . . . or to employees generally." H.R. 3020 § 2(12), *supra*, 1 Leg. Hist. at 40-41.

was "one of the most important and critical problems" in the Wagner Act:

> [E]mployers as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be "independent" of the union of the rank-and-file, they are subject to influence and control by the rank-and-file.
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> * * * *
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> Supervisors are management people. . . . No one forced them to become supervisors. They abandoned the "collective security" of the rank-and-file voluntarily because they believed the opportunities thus opened to them to be more valuable to them than such "security." . . .
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> * * * *
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> The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its "expertness", changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust. [H.R. Rep. No. 245, 80th Cong. 1st Sess. at 16-17 (1947).]

The House adopted the Hartley bill without significant amendment. *See* 1 Leg. Hist. at 158-226.

In the Senate, the Labor Committee, chaired by Senator Taft, held extensive hearings on a series of bills introduced by Senator Ball, two of which contained identical provisions to remove supervisors from the protection of the NLRA, *see* S. 55, 80th Cong., 1st Sess. § 202 (1947); S. 360, 80th Cong., 1st Sess. § 2 (1947), and neither of which contained an analogue to § 8(b)(1)(B). The Labor Committee reported out a bill containing a variant of the Ball proposal (with a narrower definition of the term "supervisor"), *see* S. 1126, 80th Cong., 1st

Sess. §§ 2(3), 2(13) (1947), 1 Leg. Hist. at 102-104, and also containing a variant of what is now § 8(b)(1)(B); as explained in the Union's brief in this case, the latter section was taken from bills introduced by Senators Morse and Ives.

The Senate Labor Committee justified its proposed §§ 2(3) & 2(13) as follows:

> It is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent tendency to subordinate their interests whenever they conflict with those of the rank and file. . . .
>
> In recommending the adoption of this amendment, the committee is trying to make clear what Congress attempted to demonstrate last year when it adopted the Case bill. . . . It should be noted that 'all that the bill does is to leave the foremen in the same position in which they were in until the Labor Board reversed the position it had originally taken . . . In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by the National Board or any local agency to accord to the front line of management the anomalous status of employees. [S. Rep. No. 105, Pt. 1, 80th Cong., 1st Sess. at 5 (1947).]

And Senator Taft, in explaining those provisions of the bill to the Senate, put it this way:

> The bill provides that foremen shall not be considered employees under the National Labor Relations Act. They may form unions if they please, or join unions, but they do not have the protection of the National Labor Relations Act. They are subject to discharge for union activity, and they are generally restored to the basis which they enjoyed before the passage of the Wagner Act.

* * * *

> It is felt very strongly by management that foremen are part of management; that it is impossible to manage a plant unless the foremen are wholly loyal to the management . . . The Committee felt that foremen either had to be a part of management and not have any rights under the Wagner Act, or be treated entirely as employees, and it was felt that the latter course would result in the complete disruption of discipline and productivity in the factories of the United States. [2 Leg. Hist. at 1008-09]

See also 2 *Id.* at 1064 (Sen. Ellender), 1946 (Sen. Ball).

The Taft bill was approved by the Senate without change to its provisions regarding the "employee" status of supervisors, *see* 1 Leg. Hist. 230, 232, 264; the House, in conference accepted the Senate's definition of "supervisor," *see* H.R. Rep. No. 510, 80th Cong., 1st Sess. at 35 (1947); and that version ultimately was enacted into law as part of the LMRA.

(b) There can be no doubt, in light of the foregoing, that, as the Court stated in *FP&L*, §§ 2(3) and 14(a) were enacted as "the solution to the general problem of supervisor-member conflict of loyalties." 417 U.S. at 813. Those sections give employers the right "to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in nor retain membership in a Labor organization." *Id.* There is no hint in the legislative materials that any of the sponsors of those sections viewed the privilege created thereby as inadequate to protect employers fully from supervisors with divided loyalties; indeed the fact that neither the Case bill, the Ball and Ellender amendments, the Hartley bill, nor the Ball bills contained any provision similar to § 8(b)(1)(B) demonstrates that the sponsors of §§ 2(3) and 14(a) viewed those sections as sufficient in and of themselves to "meet th[e] issue" (p. 14 *supra*) and to protect employers from the problem of disloyal supervisors.

Against this background, the question posed by the interpretation of § 8(b)(1)(B) announced in *Oakland Mailers* is simply this: did Congress, in enacting that section, intend to give employers *additional* protection with respect to the conflicting loyalty problem. Several considerations compel a negative answer to that question.

First, and most important, the legislative history of § 8(b)(1)(B), reviewed in detail in the Union's brief in this case, contains no evidence of any such intent. To the contrary, that section consistently was described as a narrow provision addressed to direct union pressure being placed on the employer, especially in the context of union attempts to force an employer to bargain through a multiemployer association.

Nor is it plausible to believe in light of the origins of the section (in bills introduced by Senators Morse and Ives); the identity of its supporters (including the Democratic minority in the Senate); and the political context in which it was enacted (first by a Senate Labor Committee in which Senators Morse and Ives held the balance of power, and second by a full Senate in which the support of moderate Senators like Senator Ives was critical in order to obtain the votes necessary to override a presidential veto) that there was any broader, *unarticulated* intent underlying § 8(b)(1)(B). Indeed, to so conclude it would be necessary to hypothesize that Senators Morse and Ives, supported by Senator Murray and his allies, sought to create for employers a broader protection than Representatives Case or Hartley or Senators Ellender and Ball deemed necessary, and that this broader protection was considered so obvious and noncontroversial as not to merit even a mention during the legislative consideration of the bill. Such a hypothesis collapses of its own weight.

Second, to view § 8(b)(1)(B) as addressing the issue of conflicting loyalties is to turn Congress' approach to this issue on its head. For Congress' solution to the di-

vided loyalty problem was (in contemporary parlance) one of deregulation: Congress excluded supervisors from the NLRA's definition of "employee," and expressly preempted any state law granting similar rights to supervisors, *so that employers would have a self-help remedy available to deal with supervisors whose loyalty was divided.* Congress did so because it believed that supervisors who belonged to unions were "*inherent[ly]*" in a position of conflict. P. 13 *supra.* Yet *Oakland Mailers* purports to resolve what Congress understood to be this inevitable conflict—and for which Congress provided a self-help remedy—by a classic *regulatory* means: under that decision the Board claims the power to invalidate any union conduct which, in the Board's view, interferes with an employer's control over his representatives.

The ultimate upshot of this regulation could not be more anomalous. Whereas Congress intended supervisors to be non-persons in the eyes of the NLRA—to "restore" the law as it was "before the passage of the Wagner Act," p. 17 *supra*, the Board has granted supervisors a *preferred* status: supervisors alone may receive all of the benefits of union membership without being held accountable for breaching the duties of such membership.

Third, and finally, the Board's approach to § 8(b)(1)(B) ignores *other* values embedded in the LRMA, aside from the goal of protecting employers from supervisors with conflicting loyalties. In particular, the Board's interpretation ignores the determination of Congress—and especially of Senators such as Senator Ives, whose support was critical to overriding President Truman's veto—to avoid interfering in internal union affairs. That determination is most clearly evident in the Senate's debate over § 8(b)(1)(A), which debate is reviewed in the Union's brief in this case. And *Oakland Mailers* trenches on the congressional policy evidenced in that debate by allowing the Board to preclude unions from enforcing valid union rules, reflecting legitimate

trade union considerations, whenever, in the Board's view, such enforcement would threaten an employer's control over his representatives.

(c) In sum, the statutory language and its history prove that the Court correctly concluded in *FP&L* that § 8(b)(1)(B) is not and was not intended to be "any part of the solution to the general problem of supervisor-member conflict of loyalties." P. 9 *supra*. That being so, the Board in *Oakland Mailers* erred in extending § 8(b)(1)(B) to reach "indirect" coercion of employers, as the decision in that case rests on the mistaken theory that § 8(b)(1)(B) is a "general prohibition" on union conduct which "deprives the employer of the undivided loyalty of the supervisor." P. 5 *supra*.

D. Against this background we turn to this Court's decision in *American Broadcasting Co. v. Writers Guild*, *supra*, 437 U.S. 411, which, we acknowledge, accepts *Oakland Mailers*' understanding of § 8(b)(1)(B).

(1) The question in *ABC* was whether § 8(b)(1)(B) prohibits a union from disciplining a supervisor-member who, during the course of a strike, performs supervisory work. In two cases decided shortly before it decided *ABC*, the Board had answered that question in the affirmative, concluding that such discipline was impermissible because of its "adverse carry-over effect" on the supervisors' future performance of their § 8(b)(1)(B) functions. *Chicago Typographic Union No. 16 (Hammond Publishers)*, 216 NLRB 903, 905 (1975), *enf'd*, 539 F.2d 242 (D.C. Cir. 1976); *see New York Typographical Union No. 6 (Triangle Publications)*, 216 NLRB 896 (1975). Overturning the decision of its Administrative Law Judge in *Hammond Publishers* who had understood *FP&L* to teach that when such adverse effects result from a "conflict of interests for supervisors" they are not the concern of § 8(b)(1)(B), 216 NLRB at 915 (ALJ opinion), the Board reasoned as follows:

> The Supreme Court stated that an employer may not permit a supervisor to become a union member

> and yet continue to be able to demand "absolute loyalty" from that supervisor. We interpret this to mean that an employer who permits his supervisors to become union members may no longer demand the loyalty of these supervisors if they cross a picket line and, in effect, substitute their services for those of rank-and-file employees. In this regard, however, we do not believe that the Supreme Court's decision is so broad that it means that an employer surrenders his right to require the loyalty of these same supervisors when they cross a picket line and thereafter perform substantial supervisory functions . . . [*Id.* at 905].

In its decision in *ABC* the Court agreed with the Board's conclusion that union discipline of supervisor-members for performing supervisory duties during the course of a strike deprives employers of a § 8(b)(1)(B) right to "require the loyalty" of such supervisors. The Court reasoned, in essence, that in light of the likely effect of the discipline on the supervisor-members, "[f]or an employer in these circumstances to insure having satisfactory collective-bargaining and grievance-adjustment services would require a change in his representative." 437 U.S. at 435. And the Court concluded that this impact sufficed to establish a violation of § 8(b)(1)(B):

> As the Board has construed the Act from *Oakland Mailers* to *Triangle* [*Publications*], *Hammond* [*Publishers*] and the cases now before us, such a likely impact on the employer constitutes sufficient restraint and coercion in connection with the selection of collective-bargaining and grievance-adjustment representatives to violate § 8(b)(1)(B). In *FP&L* the Court declined the invitation to overrule *Oakland Mailers*, and we do so again. [*Id.*, at 435-36.]

In reaching this conclusion, the Court rejected the union's argument that the employer could avoid the dilemma the Court posited—and thereby avoid any "impermissible coerc[ion]"—by following the course emphasized in *FP&L*: "requir[ing] the [supervisor-member] to

leave the union and thus free himself from further threats of union discipline." *Id.* at 426. Significantly, the Court did not fault the logic of the union's position. Instead the Court stated that

> if the argument were to be accepted, indirect pressure on the employer by sanctioning supervisor-members for the manner in which they perform their grievance-adjusting function (as in *Oakland Mailers*) would never be a violation because the supervisor could, at the employer's request, escape from union threats and sanctions. The Board's construction of the Act is to the contrary, however, and, as we have said, we are not prepared at this juncture to override it. [*Id.* at 437]

Justice Stewart, the author of *FP&L*, vigorously dissented from the majority's decision in *ABC*. Unlike the majority, who viewed *FP&L* as supporting—indeed almost compelling the decision in *ABC*—Justice Stewart was of the opposite view. He reasoned that the Court "clearly held in *FP&L* [that] an employer's remedy if he does not want to share the loyalty of his supervisors with a union is to insist that his supervisory personnel not belong to a union," *ABC*, 437 U.S. at 441 (Stewart, J., dissenting), and that *FP&L*

> flatly rejected the argument that union discipline aimed at enforcing uniform rules violated § 8(b)(1)(B) simply because it might have the ancillary effect of "depriv[ing] the employer of the full allegiance of, and control over, a representative he has selected for grievance adjustment or collective bargaining purposes." [*ABC*, 437 U.S. at 439-40 (Stewart, J., dissenting); emphasis in original]

(2) As Justice Stewart's *ABC* dissent demonstrates, *ABC's* major premise conflicts with *FP&L's* reasoning. For notwithstanding the fact that the supervisors did rank-and-file work during the strikes in *FP&L* and supervisory work during the strike in *ABC*, the likely effect of the union discipline was indistinguishable in the two

cases. And the principal lesson of *FP&L* is that, in light of the employer's right under § 2(3) to require his representatives to refrain from joining a union, the effect of union discipline on supervisors whom an employer allows to retain their union membership is *not* a basis for finding a violation of § 8(b)(1)(B).

The Court in *ABC* was, of course, correct in recognizing that the logic of this lesson extends not only to cases in which supervisor-members are disciplined for strike-breaking but to any case involving union discipline of its members. But the *ABC* Court's belief that *FP&L* had rejected that conclusion finds no support in the Court's opinion in *FP&L:* while it is true, as the Court in *ABC* stated, that *FP&L* had "declined the invitation to overrule *Oakland Mailers*," *ABC*, 437 U.S. at 436, it is equally true that *FP&L* declined the invitation to *endorse Oakland Mailers*. *See FP&L*, 417 U.S. at 804-05 ("We may assume *without deciding* that the Board's *Oakland Mailers* decision fell within the outer limits of the statute"); *see also* n.2 *supra*. Thus *FP&L* left *open* the continuing vitality of *Oakland Mailers*. And while *ABC* answered that question, it did so without confronting the logic of *FP&L* or of the 1947 Congress, and it did so without providing a basis in principle for sustaining the Board's doctrine. We therefore respectfully urge the Court to follow the sound logic of *FP&L*.

E. One final point needs to be made. The *Oakland Mailers* doctrine is not only contrary to the language and legislative history of § 8(b)(1)(B), but also produces results at war with the policies of the Act as a whole. The decision in *ABC* provides a clear illustration.

As Justice Stewart observed in his dissenting opinion in that case, the end result of the Court's decision in *ABC* is to tip the "balance of power" between labor and management "measurably in favor of the employer at the most delicate point of direct confrontation, by completely preventing the union from enlisting the aid of

its supervisor-members in a strike effort." 437 U.S. at 442. (Stewart, J., dissenting). Stated more simply, *ABC* "prevents a union with supervisory members from effectively calling and enforcing a strike." *Id.* at 440-41 (Stewart, J., dissenting).

Nothing in the legislative history remotely suggests that § 8(b)(1)(B) was intended to have this effect; indeed, given the origins of that section and the political context in which it was enacted, it is most implausible to attribute such an intent to Congress. To so read § 8(b)(1)(B) it again is necessary to assume that Senators Morse and Ives (joined by Senators Murray and his allies) created a protection for employers that neither Representative Hartley nor Senator Ball had deemed necessary, and that this added protection was so readily agreeable that to all so concerned it went wholly unnoticed during the legislative debates.

Moreover, as this Court has repeatedly stated, the NLRA seeks "generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835 (1984). And as Justice Blackmun has explained:

> Because the employees' power protected in the NLRA is the power to act collectively, it has long been settled that the collective has a right to promulgate rules binding on its members, so long as the employee's decision to become a member is a voluntary one and the rules are democratically adopted . . . Unless internal rules can be enforced, the union's status as bargaining representative will be eroded, and the rights of the members to act collectively will be jeopardized. "Union activity, by its very nature, is group activity, and is grounded on the notion that strength can be garnered from unity, solidarity and mutual commitment. This concept is of particular force during a strike, where the in-

> dividual members of the union draw strength from the commitments of fellow members, and where the activities carried out by the union rest fundamentally on the mutual reliance that inherences in the 'pact.'" [*Pattern Makers v. NLRB*, *supra*, 53 L.W. at 4934 (dissenting opinion).]

In sum, because it protects the broader policies of the NLRA and vindicates the specific legislative judgments embodied in § 8(b)(1)(B) and §§ 2(3) and 14(a), *FP&L*—rather than *Oakland Mailers*—states the proper understanding of the reach of § 8(b)(1)(B).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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